SUPREME COURT, U. S.

No. 73-1761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
MAY 24 1974
MICHAEL RODAK, JR., CLERK

DISTRIGAS CORPORATION
DISTRIGAS OF NEW YORK CORPORATION
DISTRIGAS OF MASSACHUSETTS CORPORATION,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

PACIFIC LIGHTING SERVICE COMPANY, *et al.*,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717, *et seq.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Distrigas Corporation, Distrigas of New York Corporation and Distrigas of Massachusetts Corporation (hereinafter "Distrigas" or "petitioners"), petition for a writ of ceritorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-19a) is not yet reported. The order of the Federal Power Commission issued May 25, 1973 (App. B, *infra*,

pp. 20a-27a) and its order denying rehearing issued June 20, 1973 (App. C, *infra*, pp. 28a-63a) are reported at 49 FPC —— and ——, respectively. Federal Power Commission Opinion Nos. 613 and 613-A are reported at 47 FPC 752 and 1465, respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Does Section 3 of the Natural Gas Act authorize the Federal Power Commission to exercise the regulatory authority conferred under Section 7 of the Act with respect to matters which have been excluded from the Commission's jurisdiction by Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b)?

2. Did the Federal Power Commission orders issued May 25, 1973 and June 20, 1973 illegally revoke a prior final and non-appealable order, i.e., Opinion No. 613, in which the Commission held that it did not have jurisdiction under Section 7(c) of the Act with regard to Distrigas's construction and operation of its Massachusetts and New York liquefied natural gas (LNG) terminals and its sales of LNG in those states?

STATUTES INVOLVED

Sections 1, 2, 3 and 7(c), 7(e) and 19(b) of the Natural Gas Act, 15 U.S.C. 717, 717a, 717b and 717f(c), 717f(e) and 717r(b) are set forth in Appendix D, *infra*, pp. 64a-69a.

STATEMENT

A. The Original Distrigas Project

This case involves the first Commission decision concerning the long-term importation of LNG from a foreign source. In 1970, Distrigas applied to the Commission for authority under Section 3 of the Natural Gas Act (15 U.S.C. 717b) to import up to fourteen (14) shiploads of LNG per year for 20 years from Algeria.[1] The application disclosed that this LNG would be received at terminals to be constructed at Everett, Massachusetts and Staten Island, New York and that the LNG would be sold to numerous gas distribution utility customers operating in those and other Northeastern and Mid-Atlantic states. Without waiving the right to contest any assertion of jurisdiction by the Commission under Section 7 of the Act (15 U.S.C. 717f), or otherwise, Distrigas also requested in its application "the issuance of any disclaimer of jurisdiction or order deemed necessary by the Commission to assure that Distrigas would be able to proceed to fulfill its contractual commitments to supply LNG to its customers at the time specified in those commitments."

After due notice, formal, public hearings on Distrigas's application were held during December 1970 before one of the Commission's hearing examiners (now Administrative Law Judge). In June 1971, the presiding examiner issued his initial decision recommending that Distrigas, subject to certain conditions, be authorized to import LNG as requested (47 FPC 797). The presiding examiner also found that Distrigas had met the required burden of proof under Section 7 of the Act; accordingly, he recommended that a certificate of public convenience

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[1] Each shipload would consist of 300,000 barrels of LNG which is the liquid equivalent of approximately 1.1 billion cubic feet of natural gas. Natural gas becomes a liquid at approximately atmospheric pressure when its temperature is reduced to —259 degrees F.

and necessity be issued authorizing the proposed sales in interstate commerce of LNG for resale (47 FPC at 844). Various exceptions to the presiding examiner's decision were filed.

B. Opinion Nos. 613 and 613-A

On March 9, 1972, the Commission, in a three-to-two decision,[2] issued its Opinion No. 613 (47 FPC 752; App. C, pp. 42a-60a) entitled, "Opinion and Order Granting Authorization to Import Liquefied Natural Gas (LNG)." That opinion affirmed the presiding examiner's approval of the project.

The Commission also affirmed the presiding examiner's determinations that: (1) LNG is natural gas as that term is defined in Section 2(5) of the Natural Gas Act (15 U.S.C. 717a(5)); (2) that to the extent Distrigas proposed to transport natural gas by barge or to sell natural gas in interstate commerce for resale, it was a natural gas company;[3] and (3) that with respect to the importation of natural gas, the decision of the District of Columbia Circuit in *Border Pipe Line Company* v. *F.P.C.*, 84 U.S. App. D.C. 142, 171 F.2d 149 (1948) was controlling, and accordingly, the importation of natural gas is not in "interstate commerce" as that term is defined in Section 2(7) of the Act (15 U.S.C. 717a(7)) (47 FPC at 756, 759; App. C, pp. 44a-45a; 49a).

The Commission held that foreign commerce ceased upon the delivery of the LNG to the Everett and Staten

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[2] The majority consisted of Commissioners Brooke, Carver and Walker; the minority of Chairman Nassikas and Commissioner Moody. The composition of the Commission has significance in this case. See pp. 7-9, *infra*.

[3] In Opinion No. 613 the Commission noted that its jurisdiction over the transportation of LNG by barge was a matter being considered by the Commission in Docket No. R-377, notice of which was issued on January 15, 1970 (47 FPC at 756; App. C, p. 45a). On May 4, 1973, the Commission dismissed Docket No. R-377, holding *inter alia*, that it had no jurisdiction under the Act over the interstate transportation of LNG by barge (49 FPC ——).

Island storage and terminal facilities (47 FPC at 758-759; App. C, p. 49a). The Commission also held that its jurisdiction under Section 7 of the Act attached at the tailgate of the LNG storage tanks with respect to that portion of the LNG or natural gas to be sold in intertsate commerce for resale. It expressly affirmed the presiding examiner's finding "that storage of this LNG, the regasification of this LNG, the sale of either the liquid or regasified LNG in the state of importation and the facilities and activities related thereto are neither in foreign or [sic] interstate commerce and are therefore outside of our jurisdiction" (47 FPC at 760; App. C, p. 51a-52a).

The Public Service Commission of the State of New York (PSCNY) and The Superior Oil Company sought rehearing which was denied by the same three-to-two vote in Opinion No. 613-A (47 FPC 1465). PSCNY sought timely judicial review of Opinion Nos. 613 and 613-A in the United States Court of Appeals for the District of Columbia Circuit (Case No. 72-1588). Pursuant to its own motion, PSCNY's petition for review was dismissed on January 10, 1973. Opinion No. 613 thus became a final, non-appealable order within the purview of Section 19(b) of the Act, 15 U.S.C. 717r(b).

Distrigas, in reliance upon Opinion No. 613, entered into long term contracts for the sale of imported LNG with various gas distribution companies and proceeded with construction of its LNG terminals.[4] Distrigas also

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[4] Construction of the terminal at Everett, Massachusetts had been completed in November 1972 at a total cost of approximately 30 million dollars ($30,000,000). The terminal contains two large cryogenic storage tanks of 600,000 and 374,000 barrel capacity, respectively; three vaporization, odorization and air stabilization systems; send-out facilities for vaporized gas, a small laboratory and office building; and a pier for unloading cryogenic oceangoing vessels and for loading cryogenic barges. The terminal occupies a site on the Mystic River in Boston Harbor and is already

entered into new contracts for the purchase of additional quantities of LNG. In late 1972 and early 1973, it filed further applications requesting Commission authorization to import additional quantities of LNG from Algeria to Staten Island and Everett. During this same period, additional applications were also filed by various of the petitioners with the Commission requesting Section 7 certificate authorization to transport regasified LNG in interstate commerce and to sell in interstate commerce for resale the imported LNG covered by both the original and later import applications.[5]

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in operation in accordance with Opinion No. 613. Six shiploads of LNG have been received at this terminal.

At the present time, construction continues on the Staten Island terminal. The terminal is located near Rossville and will include two 900,000 barrel cryogenic storage tanks, four vaporization, odorization and air stabilization systems, and marine loading and unloading facilities. Construction of the first tank and loading and unloading facilities were completed in January 1974; the entire terminal, including the second tank, is scheduled for completion by the end of 1974. Total cost is estimated to be well over 100 million dollars ($100,000,000).

[5] The additional import applications were filed in Docket Nos. CP73-78 and CP73-132. The Section 7 certificate applications were filed in Docket Nos. CP73-135, CP73-148, CP73-205 and CP73-230.

Distrigas and the other petitioners herein are subsidiaries of Eastern Energy Corporation, a wholly owned subsidiary of Cabot Corporation. Distrigas continues to be the importer of LNG. Distrigas of New York Corporation (DONY) is now the owner and operator of the Staten Island, New York terminal facilities. Distrigas of Massachusetts (DOMAC) is now the owner and operator of the terminal facilities in Everett, Massachusetts. Another affiliate, Distrigas Pipeline Corporation, proposes to construct and operate a short pipeline under the Arthur Kill between Staten Island and Woodbridge, New Jersey for the purpose of delivering regasified LNG to customers in that state. The applications now pending before the Commission reflect these corporate changes.

Following oral argument in the court of appeals, petitioners filed further applications *under protest* requesting Section 7(c) certificate authorization for the construction and operation of their LNG storage and regasification facilities in Docket Nos. CP74-122 and CP74-137.

Petitioners made repeated and urgent pleas for prompt and expeditious consideration and disposition of all of their pending applications. Despite these pleas, the Commission refused to set the applications for hearing. Instead, the Commission issued its order of May 25, 1973, the first of the two orders now under review.

C. The Orders of May 25 and June 20, 1973

By a vote of two to one (Commissioners Carver and Walker having resigned and having not yet been replaced) and without notice of any kind, the Commission by its order issued May 25, 1973, abruptly reversed its jurisdictional determination with respect to Distrigas's terminal facilities in Opinion Nos. 613 and 613-A. The order held that the Commission had jurisdiction under Section 7 of the Act over the construction and operation of the Everett and Staten Island terminals and it directed Distrigas to file applications for authorization to construct and operate, as appropriate, such facilities (App. B, pp. 20a-23a).

The Commission majority, which as of May 25, 1973 consisted of Chairman Nassikas and Commissioner Moody, the dissenters in Opinion Nos. 613 and 613-A, based its order upon a theory of "changed circumstances." It claimed that the Distrigas applications, specifically those filed subsequent to the issuance of Opinion No. 613, indicated that the complexion of the entire Distrigas import project had been significantly altered from one that was basically intrastate in character to one that was interstate in nature. The two-member majority asserted that the Commission had Section 7 jurisdiction over the terminals because the terminals at Everett and Staten Island were ". . . to be used for the transportation of natural gas in interstate commerce and the sale of natural gas in interstate commerce for resale. . . ." (App. B, p. 22a). Commissioner Brooke dissented. He pointed out that Distrigas, in its first application, had proposed

to make interstate sales as well as intrastate sales of LNG and that the Commission's theory of "changed circumstances" was inconsistent with the facts of record (App. B, pp. 24a-25a).

By order issued June 20, 1973, the Commission denied Distrigas's timely application for rehearing (App. C, pp. 28a-36a). Abandoning the theory of "changed circumstances," the two-member majority in this order reverted to the position it had asserted as respects jurisdiction when it was the minority in Opinion No. 613, i.e., that the statutory definition of "interstate commerce" in Section 2(7) of the Act (15 U.S.C. 717a(7)) encompasses the importation of LNG and that any facilities used for the importation of LNG are used in interstate commerce and therefore require Section 7 certificate authorization (App. C, p. 33a). Furthermore, the majority held that Section 7 certificate authorization is also required to make any sales for resale or transportation of LNG either within or outside the state of importation (App. C, p. 34a).[6] In making this determination, the two-member majority of the Commission interpreted "interstate commerce," as that term is defined in the Natural Gas Act to include foreign commerce, an interpretation which the Commission majority in Opinion No. 613 had, in reliance on the District of Columbia Circuit's decision in *Border*, specifically rejected. In fact, the present majority stated that:

> "to the extent the *Border* decision could compel a contrary result, that holding is in error." (Footnotes omitted) (App. C, p. 32a)

In its June 20 order, the Commission acknowledged "that Distrigas had made substantial investment in re-

[6] The majority contended that there were at least two legal theories which could form the basis of a uniform jurisdictional policy with respect to LNG imports: "interstate commerce" and "commingling," both arising from Section 7 of the Act. In the order of June 20, the "commingling" theory was rejected (App. C. pp. 31a; 34a).

liance upon Opinion Nos. 613 and 613-A" and indicated that it was "not unmindful of the problems and equities association with application of a change of policy," but the majority determined that the opinion it had expressed as the minority in Opinion No. 613 was now to be given full force (App. C, pp. 34a-35a).

Commissioner Brooke, again vigorously dissented, finding the order of June 20, 1973 ". . . a gross injustice and a denial of due process. . . ." He disagreed with the majority's analysis of "interstate commerce," which, as noted, would render the facilities of any LNG import project subject to Section 7 jurisdiction, regardless of the future destination of the gas or for what purpose the gas would ultimately be used (App. C, pp. 37a-41a).

The orders of May 25 and June 20, 1973 have been stayed by appropriate orders of the Commission and the court below.

D. The Opinion of the Court of Appeals

The court rejected the Commission's arguments in defense of its concept of "interstate commerce" and refused to overrule its prior decision in *Border*, *supra*. Hence, the court found that the Commission's orders of May 25, 1973 and June 20, 1973 were not properly supported (App. A, pp. 13a; 18a).

The court also rejected Distrigas's contention that *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), which forbids retroactive revocation of a prior final agency order, should be given controlling weight. The court distinguished *Seatrain* on the ground that, unlike the statute involved in that case, Section 3 of the Act expressly authorized the Commission to issue the kind of orders it did on May 25 and June 20, 1973, provided that opportunity is given for the hearing required under that section (App. A, p. 16a).

The court remanded the record to the Commission for supplementation pursuant to the provisions of Section 3 of the Act (App. A, p. 19a).

REASONS FOR GRANTING THE WRIT

The decision of the court below has significance because it concerns a series of orders arising out of the first proposal presented to the Commission for the long term importation of LNG from a foreign source. The Commission, in Opinion No. 613, expressly recognized the importance and indeed the necessity for numerous large scale importations of LNG as a means of supplementing our nation's dwindling domestic supplies of natural gas.[7] Each LNG import proposal will require massive capital expenditures for the construction of natural gas production, gathering and liquefaction facilities in the country of origin and for the construction of receiving terminals and regasification facilities in the importing country, as well as for the construction of specially designed cryogenic tankers for the transportation of LNG on the high seas. The decision below forbodes serious practical consequences for persons contemplating the importation of LNG to supplement existing supplies of natural gas. If there is a possibility that an import authorization can be revoked retroactively, potential importers may be reluctant to commit the capital required for the importation of LNG.

This case also involves issues of national importance in the administration of the Act. Section 3 of the Act has never been reviewed by this Court. The case presents

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[7] In Opinion No. 613, the Commission also discusses in detail the decline in proven natural gas reserves, the decline in daily production capacity, the necessity for curtailment of sales by various interstate natural gas pipelines and the Commission's anticipation of even more severe shortages in the future (47 FPC 761-764; App. C, pp. 52a-57a).

for the first time the question of whether the conditioning authority of Section 3 can be used to impose Section 7 certificate jurisdiction over intrastate sales and operations over which the Commission has been expressly denied jurisdiction by Section 1(b) of the Act. Indeed, the question here is not simply whether such authority can be exercised *in futuro* but whether such authority can be imposed *retroactively* upon sales commenced and facilities placed in operation in accordance with a solemn holding that they were not subject to Commission jurisdiction. The decision below is not only inconsistent with the provisions of the Act, particularly Section 1(b), but it is contrary to the teaching of this Court in *Seatrain* and seriously erodes the doctrine of finality of agency orders. Review by this Court is, therefore, urgently needed.

1. While the court below disagreed with the Commission on the proper basis for its assertion of jurisdiction over the construction and operation of the Distrigas terminals and intrastate sales of imported LNG, it ultimately decided that federal regulatory authority should be asserted. In remanding the case the court below erroneously held that the Commission could condition an import authorization under Section 3 so as to supplant state regulatory authority over intrastate facilities and intrastate sales of imported LNG, if the Commission found that comprehensive federal regulation was "necessary and appropriate" to the public interest.[8] The court simply

[8] As dictum, the court below observed that "At the same time, nothing in this opinion precludes the Commission on remand, from reverting to the commingling theory, rather than turning to Section 3, if it does so in a manner that allows responsible judicial review." (App. A, p. 19a). The dictum is wholly inconsistent with the court's recognition that this Court's decision in *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80 (1943) (App. A, p. 19a) prevents an affirmance of the Commission's order on the basis of the commingling theory because the Commission itself rejected that theory in the order of June 20, 1973.

The court's comment regarding "commingling" in this dictum is also inconsistent with its refusal to reverse its earlier decision

ignored Section 1(b) of the Act which specifically excludes intrastate sales and operations from the Commission's regulatory jurisdiction under the Act.

The court's interpretation of the Commission's "conditioning" power under Section 3 must be rejected as inconsistent with the plan of regulation adopted by Congress in enacting the Natural Gas Act. In Section 1(a), Congress first declared the necessity for regulation of transportation and sales "in interstate and foreign commerce." It then provided one section applicable to imports and exports of natural gas from or to a foreign country and in other sections provided regulatory measures applicable to interstate commerce. The legislative history of the Act demonstrates that Congress intended to make a clear distinction between the Commission's authority over foreign commerce under Section 3 and its regulatory jurisdiction over interstate commerce under other sections of the Act. Foreign commerce was specifically included in the definition of "interstate commerce" in Title III of the Rayburn bill H.R. 5423, 74th Congress, 1st Session, the bill which was the original legislative foundation for the Natural Gas Act; but "foreign commerce" was excluded from that definition in the statute as it was finally enacted.[9] The legislative history does not show a Congressional intent that Section 3 could be used by the Commission to override the limitations placed on its jurisdiction by Section 1(b).

The court below acknowledged that the purpose to be achieved by Commission regulation under the Act was

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in *Border, supra*, which held that foreign commerce was separate from and not a part of interstate commerce. The "commingling" theory is essentially the same as the interstate commerce theory. Commingling results when jurisdictional interstate natural gas from one source is mixed with non-jurisdictional intrastate gas from another source in a jurisdictional facility.

[9] A concise description of this legislative history is set forth in *Border, supra*, 171 F.2d at 150-151.

broadly complementary to that reserved to the states so there would be "no gaps" for private interests to subvert the public welfare. The court went on to say, however, that the Commission's authority under Section 3 with respect to imported LNG was sufficiently elastic that it could assert its regulatory jurisdiction and authority under other sections of the Act to supplant state regulation if the Commission, in effect, found that regulation in a particular state was ineffective. The Congress plainly did not give the Commission such wide discretion. As the legislative history demonstrates, the Natural Gas Act and the Federal Power Act were enacted by Congress primarily to fill the regulatory gap arising under the decisions in this Court in *Public Utility Commission of Rhode Island* v. *Attleboro Steam and Electric Company*, 273 U.S. 83 (1927) and *State of Missouri, ex. rel., Barrett* v. *Kansas Natural Gas Company*, 265 U.S. 298 (1924); those statutes were not enacted to invade the area of intrastate activities where states are fully competent to regulate.[10]

2. The court erred in dismissing petitioners' primary contention that the teaching of *Seatrain* is controlling upon the disposition of this case. *Seatrain* is based upon

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[10] See Report No. 709, Committee on Interstate and Foreign Commerce, House of Representatives, and Report No. 1162, Committee on Interstate Commerce, U.S. Senate, 75th Congress, 1st Session on H.R. 6586 (1937), the bill that became the Natural Gas Act.

When Section 7 of the Act was amended in 1942, the intention of Congress to refrain from vesting the Commission with any authority over intrastate matters was restated. See Report No. 1290, Committee on Interstate and Foreign Commerce, House of Representatives, 77th Congress, 1st Session on H.R. 5249 (1941).

Moreover, when Section 1(c) was added to the Act in 1954, Congress again reaffirmed its original intent that the Act was to supplement and not supplant state regulation. See Report No. 899, Committee on Interstate and Foreign Commerce, House of Representatives, and Senate Report No. 817, Committee on Interstate and Foreign Commerce, U.S. Senate, 83rd Congress, 1st Session on H.R. 5976 (1953).

the principle of finality of agency orders. It forbids retroactive revocation of the terms of a prior final agency order in whole or in part except as specifically authorized by Congress. The teaching of *Seatrain* is so intimately related to the doctrine of fairness under our constitutional system that any departure from *Seatrain* in this case would also constitute a deprivation of property without due process of law in contravention of the Fifth Amendment.

The court rejected *Seatrain's* applicability on two grounds: first, it found that the Commission can revoke retroactively a right vested in petitioners by Opinion No. 613, provided it gives petitioners an opportunity for hearing and upon a showing of good cause. The court holds that such a power stems from the Commission's authority under Section 3 to issue permits for the exportation or importation of natural gas "upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate." Second, the court interprets the text of Opinion No. 613 at 47 FPC 764-765 (App. C, pp. 57a-58a) as a warning to Distrigas that its jurisdictional decision was tentative only, and might be changed should the Commission determine, in the future, that the public interest so required (App. A, p. 16a).

Petitioners do not dispute that the Commission has broad powers under Section 3 to attach conditions to import and export permits and to issue, under the statutory conditions specified, supplemental orders revising an authorization previously granted. But the power to revoke an authorization retroactively, in whole or in part, is not specifically stated in the statute and such an arbitrary power cannot properly be inferred. The only logical interpretation that can be placed on Section 3 is

that Congress authorized the Commission to act only prospectively in attaching conditions or in making supplemental orders. Moreover, there can be no doubt that the Commission in Opinion No. 613 specifically noted that it might change its regulatory policies in the future and that it might, if necessary, issue a supplemental order regarding the import authorization granted to Distrigas in Opinion No. 613, but the text of that opinion cannot properly or fairly be constructed as a warning that the Commission might in the future reverse its authorization retroactively.

In short, the court below condones a serious abuse of the administrative process. If the decision is not reversed, petitioners will be unlawfully deprived of their rights and property contrary to the teaching of this Court in *Seatrain* and in contravention of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, it is respectively submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: MAY 24, 1974

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1747

DISTRIGAS CORPORATION
DISTRIGAS OF NEW YORK CORPORATION
DISTRIGAS OF MASSACHUSETTS CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY; PUBLIC SERVICE ELECTRIC AND GAS COMPANY; CONSOLIDATED EDISON COMPANY; BOSTON GAS COMPANY, ET AL.; EXXON CORPORATION; BROOKLYN UNION GAS COMPANY; NEW JERSEY NATURAL GAS COMPANY; SAN DIEGO GAS AND ELECTRIC COMPANY; PHILADELPHIA GAS WORKS; REPRESENTATIVE JOHN M. MURPHY; B.L.A.S.T. CITIZENS, INC., INTERVENORS

Petition for Review of An Order of the Federal Power Commission

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Decided April 5, 1974

Edwin S. Nail, with whom *Justin R. Wolf* and *Charles A. Case, Jr.*, were on the brief, for petitioners.

John R. Staffier, Attorney, Federal Power Commission with whom *Leo E. Forquer*, General Counsel, and *George W. McHenry*, Solicitor, Federal Power Commission were on the brief, for respondent.

Edward S. Kirby for intervenor, Public Service Electric and Gas Company.

Richard B. Wolf, with whom *Victor H. Kramer* was on the brief for intervenor, United States Representative John M. Murphy. *John F. Dienelt* also entered an appearance for intervenor, United States Representative John M. Murphy.

Thomas D. Clarke, with whom *K. R. Edsall* was on the brief for joint intervenors, Southern California Gas Company and Pacific Lighting Service Company.

William I. Harkaway was on the brief for intervenor, Consolidated Edison Company.

Sherman Chickering, C. Hayden Ames, Donald J. Richardson, Jr., and Edward P. Nelsen were on the brief for intervenor, San Diego Gas and Electric Company.

Barbara M. Gunther and *Joseph P. Stevens* were on the brief for intervenor, The Brooklyn Union Gas Company.

John W. Glendening Jr., and *John S. Schmidt* were on the brief for intervenor, Boston Gas Company, et al.

John H. Cooper, Jr., entered an appearance for intervenor, Exxon Corporation.

Gerald W. Conway entered an appearance for intervenor, New Jersey Natural Gas Company.

Robert J. Haggerty entered an appearance for intervenor, Algoquin Lng., Inc.

Robert W. Stern entered an appearance for intervenor, Philadelphia Gas Works.

Richard J. Sgarlato entered an appearance for intervenor, B.L.A.S.T. Citizens, Inc.

Before: BAZELON, *Chief Judge*, WRIGHT and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* Bazelon.

BAZELON, *Chief Judge*: Distrigas Corporation and its affiliates Distrigas of New York Corporation and Distrigas of Massachusetts Corporation [1] seek review of a Federal Power Commission order directing them to "file with the Commission applications pursuant to Section 7 of the Natural Gas Act for authorization to construct and operate . . . their liquefied natural gas terminal, storage, regasification, and related facilities on Staten Island, New York, and Everett, Massachusetts." [2] Distrigas challenges the order on two grounds. It contends that the Commission's attempt to apply Section 7 [3] certification requirements to the facilities that Distrigas employs, or proposes to employ, to receive imports of liquefied natural gas and to store, process, and distribute the gas for sales in both interstate and intrastate commerce directly contravenes this Court's decision in *Border Pipe Line Company* v. *F.P.C.*[4] Distrigas contends further, and with

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[1] As discussed more fully in Part I, *infra*, petitioner Distrigas Corporation is presently engaged, pursuant to FPC authorization, in the importation of liquefied natural gas for receipt at facilities located on Staten Island, New York, and at Everett, Massachusetts; these facilities, the subject of the order before us for review, are owned, respectively, by petitioners Distrigas of New York and Distrigas of Massachusetts. Petitioners, all subsidiaries of Eastern Energy Corporation, which, in turn, is a wholly-owned subsidiary of Cabot Corporation, will hereinafter be referred to collectively as "Distrigas."

[2] FPC Order in Docket Nos. CP 73-78, *et al.*, issued May 25, 1973, Joint Appendix at 1, 3; Order Denying Rehearing, issued June 20, 1973, Joint Appendix at 24.

[3] 15 U.S.C. § 717f.

[4] 84 U.S.App.D.C. 142, 171 F.2d 149 (1948).

somewhat greater vehemence, that because the Commission disclaimed jurisdiction over the facilities when it originally granted Distrigas authority to import natural gas, it is barred from exercising such jurisdiction now, whatever its statutory power and responsibility may be as to similar facilities and operations of other gas import companies.

We conclude that the Commission has jurisdiction under the Natural Gas Act to issue the kind of order before us in this case, and that exercise of its authority with respect to Distrigas is in no way precluded by the Commission's previous disclaimer. Our conclusion rests, however, on a statutory premise other than that which the Commission has invoked. We find it necessary, therefore, to remand the record to the Commission for further proceedings and action prerequisite to imposition of Section 7 requirements.

I

Central to the issues presented in this petition are the provisions of Section 3 of the Natural Gas Act, that:

> * * * [N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.[5]

[5] 15 U.S.C. § 717b.

Pursuant to this Section, Distrigas applied to the Commission on February 17, 1970, for authority to import from Algeria up to six shiploads (later increased to fourteen shiploads) of liquefied natural gas annually for a term of twenty years. According to the application, the gas was to be delivered to Distrigas at terminals and related facilities that it proposed to construct at Everett, Massachusetts, and on Staten Island, New York, thence to be sold, approximately eighty-three percent to distributors and direct customers in the states of importation and seventeen percent to distributors in other states. Together with its application, Distrigas submitted to the Commission a request that it issue a disclaimer of jurisdiction as to any of Distrigas' activities that the Commission might deem outside its regulatory responsibility or, in the alternative, that it issue whatever authorization necessary to allow Distrigas to supply its prospective customers.

On March 9, 1972, the Commission issued Opinion No. 613,[6] in which it agreed with the initial decision of the hearing examiner[7] that Distrigas' proposed importation was in the public interest and therefore granted the requested Section 3 authority. In addition, the Commission gave extended consideration to the jurisdictional problem that Distrigas had posed. That problem was, in essence, whether and to what extent Distrigas was required to seek from the Commission Section 7 certification for its proposed facilities and sales; and this in turn depended on whether and to what extent Distrigas' operations would render it a "natural gas company" within the meaning of Section 2(b) of the Natural Gas Act—i.e., "a person engaged in the transportation of natural gas

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[6] 47 F.P.C. 752 (1972).

[7] Docket No. CP 70-196, issued June 14, 1971, Joint Appendix at 35-125.

in interstate commerce, or the sale in interstate commerce of such gas for resale." [8]

The majority of the Commission found, in part, perhaps, in reliance on our decision in *Border Pipe Line Company*, that the importation of natural gas is not "interstate commerce" as those words are used in the Act.[9] It further found that the storage and regasification of liquefied natural gas were operations "separate and separable" both from the act of importation and, apparently, from the sale of the gas in interstate commerce.[10] The majority therefore decided to treat Distrigas, for jurisdictional purposes, as if it were a producer or gatherer of natural gas in the state of importation. While the Commission was clearly required by Section 3 to grant or deny import authority, the majority, observing that Distrigas proposed to take delivery of the gas at the ship's flange at the point of entry, held that foreign commerce and, hence, compulsory Section 3 jurisdiction ceased at that point.[11] And while Section 7 certification was clearly required for those sales of liquefied and regasified natural gas destined for resale in interstate commerce, the majority held that its jurisdiction over such sales attached only at the tailgate of the importer's plant. Thus, the majority concluded, Distrigas' facilities and its transport and sales of natural gas solely within the states of importation were outside its compulsory jurisdiction under either Section 3 or Section 7 and, therefore, did not require its certification.[12]

At the same time, the majority acknowledged that under Section 3 the Commission could take jurisdiction over

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[8] 15 U.S.C. § 717a(6).

[9] 47 F.P.C. at 758-59.

[10] *Id.* at 756-57.

[11] *Id.* at 759.

[12] *Id.* at 756.

Distrigas' proposed facilities and intrastate sales as part of the "terms and conditions" of authorizing importation, and that the controlling question was whether it was "necessary or appropriate" to the public interest that the Commission do so. The majority determined that it was not, that, on the contrary, "exemption of these projects [i.e., facilities and intrastate operations] from the federal regulatory umbrella will make them more attractive to private investors and lead to more gas at a lower price to the consumer, and effect this result sooner, than if [the Commission] controlled every detail and decision related thereto." [13] The majority went on to say, however, that in Distrigas' application the Commission confronted for the first time a proposal to import large quantities of liquefied natural gas for an extended period, and that its decision represented "only the first step in the development of a comprehensive Commission policy on long-term imports" of liquefied natural gas.[14] In short, the Commission warned that its estimate of where the public interest lay with respect to such imports might well change. Citing the provisions of Section 3 allowing the Commission "from time to time . . . [to] make such supplemental order in the premises as it may find necessary or appropriate," the majority recognized "its responsibility and authority to take such action if and when the public interest so requires." [15]

Two members of the Commission, Chairman Nassikas and Commissioner Moody, dissented from the majority's decision on the jurisdictional point, arguing that the public interest, the determinative criterion under Section 3, could be served only if the Commission took full regulatory authority over all of Distrigas' proposed operations and that, in any event, those operations constituted inter-

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[13] *Id.* at 760-61; 763.

[14] *Id.* at 760.

[15] *Id.* at 765.

state commerce as defined in the Act. The majority nonetheless adhered to its original decision and denied applications for rehearing.[16] A petition to review the decision, filed in this Court, was subsequently dismissed on the petitioner's motion.[17]

Thereafter, with import authorization in hand and assertedly in reliance on the Commission's limited jurisdictional disclaimer, Distrigas proceeded to construction of its Everett and Staten Island facilities, expending very substantial sums on each.[18] Distrigas also applied to the Commission for (1) Section 3 authorization to import significant additional quantities of natural gas,[19] and (2) Section 7 certification of interstate sales of gas imported under the original authorization and the new authorizations for which it had applied.[20] Since the issuance of Opinion 613, however, the complexion of the Commission had undergone some change; two members having resigned and not having been replaced, Chairman Nassikas and Commissioner Moody were now in the majority. In response to Distrigas' new applications, the Commission issued, over the dissent of the third remaining member, the order presented here for review, which, in effect, reverses the Commission's jurisdictional determination in Opinion 613. The order states that, although in its orig-

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[16] 47 F.P.C. 1465 (1972).

[17] Public Service Commission of the State of New York v. FPC, Docket No. 72-1588, dismissed Jan. 10, 1973.

[18] The terminal at Everett was completed in November, 1972, and is now in operation; the terminal on Staten Island, now in partial operation, is scheduled for completion by mid-1974.

[19] FPC Docket Nos. CP 73-78; CP 73-132.

[20] FPC Docket Nos. CP 73-135; CP 73-205; and CP 73-230. In addition, another affiliate of Distrigas, Distrigas Pipeline Corporation, filed an application for authority to construct a pipeline between Staten Island and Woodbridge, New Jersey, to transport Distrigas' regasified imports to prospective New Jersey customers. FPC Docket No. CP 73-148.

inal application Distrigas had proposed to operate primarily in intrastate commerce, its new applications, proposing "new and increased sales outside the states of importation," made clear that the Everett and Staten Island facilities would be used for the transportation and sale of gas in interstate commerce.[21] Finding that there were "no controverted facts relating to the issue of jurisdiction" and, therefore, that no hearing was required,[22] the Commission held that Section 7 certification was mandated for all of Distrigas' facilities and directed Distrigas to submit appropriate applications.

Distrigas there upon filed an application for rehearing, contending, *inter alia*, that the Commission had supplied no rational basis or findings of fact to support its jurisdictional conclusion and that, in fact, Distrigas planned no material change in its proportion of interstate to intrastate sales. In denying rehearing, the Commission ignored this contention. Instead, the majority advanced two alternative theories that, it said, supported its assertion of jurisdiction. Jurisdiction could, according to the majority, be premised on "commingling"—the use of facilities to receive, store and process gas destined for both interstate and intrastate sales. Asserting that Opinion 613 had left open the question of what proportion of interstate sales would render import facilities jurisdictional, the majority observed that commingling had been the basis of its exercise of jurisdiction in its decision, subsequent to Opinion 613, in *Columbia LNG Corporation*.[23]

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[21] Order, *supra* note 1, Joint Appendix at 2.

[22] *Id.* at 3.

[23] Opinion No. 622, 47 F.P.C. 1624 (1972). In *Columbia*, the Commission granted both import authority and Section 7 certification of the importer's terminal, regasification and storage facilities. No party in that case, however, challenged Section 7 jurisdiction, and the Commission simply noted that, in contrast to Distrigas, Columbia's operations were to be interstate in nature. Indeed, two commissioners, of four, concurred in the jurisdictional decision only because it was not a litigated issue. *Id.* at 1630 n.6.

But recognizing the regulatory problems that the commingling theory might pose,[24] the Commission advanced, and adopted as its jurisdictional policy with respect to liquefied natural gas imports, an alternative, "interstate commerce" theory. It held that all imports of natural gas, whether destined for sale in the state of importation or other states, are in interstate commerce as that term is defined in Section 2(7) of the Act,[25] and that "[t]o the extent the *Border* decision could compel a contrary result, that holding is in error." [26] Thus, the majority concluded that Section 7 certification is mandatory under the Act for all of Distrigas' facilities and sales, and reiterated its directive to file the necessary applications. Distrigas thereupon timely filed this petition for review.[27]

II

We are confronted with the question whether this Court's decision in *Border Pipeline Company v. F.P.C.* bars the Commission from requiring Section 7 certification of Distrigas' facilities. In *Border*, the Commission had attempted to apply Section 7 requirements to facilities employed to export to Mexico, by direct pipeline, gas produced in Texas. In disapproving the Commission's order, the Court said that, as a general matter of statutory construction, "interstate commerce" and "foreign commerce" are separate ideas and that the term " '[i]nterstate commerce' does not include foreign commerce, unless Congress by definition for the purposes of

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[24] In particular, the facilities of a firm, the operations of which were largely or entirely intrastate at the outset and only later became interstate, would become jurisdictional only after they were already constructed and in operation, making the traditional tests for Section 7 certification—economic feasibility, adequacy of supply, financing, costs, etc.—much more difficult to apply. Order Denying Rehearing, *supra* note 2, Joint Appendix at 29.

[25] 15 U.S.C. § 717a(7).

[26] Order Denying Rehearing, supra note 2, Joint Appendix at 28.

[27] 15 U.S.C. § 717r.

a particular statute includes them both in the single expression." [28] But Section 2(7)'s definition of interstate commerce does not expressly include foreign commerce;[29] on the contrary, the *Border* Court found strong indication in the legislative history that Congress had purposefully excluded foreign commerce from the definition. Moreover, both terms are employed in the Act, and one section of the Act, Section 3, applies to foreign commerce alone. These factors, in addition to the consistent Commission practice prior to *Border*, led the Court to conclude that Congress intended in the Act to treat interstate commerce and foreign commerce separately, and that, because *Border's* facilities were used solely for exports, they were elements of foreign commerce to which Section 7's requirements do not apply.

The Commission does not here contend that the *Border* Court's intepretation of the language and legislative history of the Act is necessarily and demonstrably incorrect, nor that, as applied to exports, *Border's* construction of the Act is unreasonable. Instead, it contends that both the statutory language and the relevant legislative history are ambiguous as to Congress' intent and cannot be supposed determinative of the extent to which the regulatory scheme applicable to interstate commerce was meant to apply to foreign commerce as well. This being so, the Commission argues, the proper scope of the term "interstate commerce" and, hence, of the Commission's Section 7 jurisdiction, can only be determined through an examina-

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[28] 171 F.2d at 150.

[29] Section 2(7) defines interstate commerce as "commerce between any point in a State and any point outside thereof . . . but only insofar as such commerce takes place within the United States." 15 U.S.C. § 717a(7).

tion of the congressional policy behind the Act and the scheme of regulation created to achieve it.[30]

The Commission urges, first, that *Border*, be distinguished from this case on the ground that, there, the Commission attempted to impose Section 7 requirements on *export* facilities, while here the Commission asserts such jurisdiction only with respect to *import* facilities and sales of imported gas. And while it might reasonably be supposed, as the Court did in *Border*, that Congress would be concerned under Section 3 only with the fact of exportation, the same cannot be said of imports, as to which detailed regulation under Section 7 of "rates, practices, accounting, facilities and financing" is necessary to the public interest.[31] The Commission's suggested distinction makes, we think, a great deal of practical sense. We can, however, find no anchor for it either in the rationale of *Border* or, what is more important, in the statutory language. The *Border* Court found that Congress had distinguished, not between imports and exports, but between foreign and interstate commerce. We think that if *Border* stands, it must exclude imports quite as much as exports from the definition of interstate commerce.

The Commission next urges that, if *Border* cannot be distinguished, it must be overruled. The Commission argues that complete and comprehensive regulation of sales of liquefied natural gas and of the facilities related to its importation is required to protect consumers. The states, however, cannot be supposed capable of imposing or of exercising the necessary regulatory authority. In addition to possible constitutional barriers to state regula-

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[30] *See, e.g.*, Mitchell v. Independent Ice & Cold Storage Co., 294 F.2d 186 (5th Cir.), *cert. denied sub nom.* Independent Ice & Cold Storage Co. v. Goldberg, 368 U.S. 952 (1961).

[31] 171 F.2d at 151.

tion, the importation, sale, and distribution of liquefied natural gas in any one state will have, according to the Commission, a marked impact on interstate commerce and, particularly, on domestic gas production and supply, since liquefied natural gas projects may become capable of drawing available capital away from domestic exploration and development. If, however, regulation were left to the states, the possibility of competition among them in attracting such projects and of inconsistencies in regulatory approach would make protection of such distinctly federal interests, the interests of consumers in all states, impossible. In short, the Commission contends that unless its interstate commerce jurisdiction is held to extend to all sales of imported natural gas and the facilities related thereto, there will result precisely the sort of "attractive regulatory gap" that Congress intended the Natural Gas Act to fill.

Despite the power of this argument, we decline to overrule *Border* at this time. We agree with the Commission that neither the language nor the legislative history of the Act's interstate commerce definition unambiguously establishes the correctness of the *Border* construction. That construction has, however, received at least some confirmation in subsequent congressional actions. Since *Border*, the Commission has asked Congress, on fourteen separate occasions, to enact legislation overruling it; each time, Congress has refused.[32] Indeed, in 1953, Congress amended the Federal Power Act to include the equivalent of the *Border* interpretation,[33] thus implicitly approving it.[34] Moreover, *Border* has governed Commission regulatory efforts with respect to imports and exports

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[32] *See* Initial Opinion of the Presiding Examiner, *supra* note 7, Joint Appendix at 81; 42 FPC Annual Report 15 (1962).

[33] 47 Stat. 461 (1953); 16 U.S.C. § 824a(f).

[34] *See* H. Rep. No. 978, 83d Cong., 1st Sess., at 2 (1953).

of natural gas for over twenty-five years, and while we cannot guage from the record and arguments before us the extent to which private concerns have been arranged in reliance on it, that extent may well be considerable. In our view, these considerations must militate strongly against our now holding that *Border* was incorrect.[35]

Nonetheless, we would not hesitate to do so were we convinced that *Border's* construction would inevitably place imports of natural gas into the sort of regulatory gap the Commission has described. It has long been recognized that the purpose of the Natural Gas Act was "to protect consumers against exploitation at the hands of natural gas companies." [36] And this purpose was to be achieved by FPC regulation "broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare." [37] We fully recognize, therefore, that this purpose must be the determinative guide in construction of the Act's regulatory scheme. We are not convinced, however, that any attractive regulatory gap need result if *Border* is allowed to stand. Under Section 3, the Commission's authority over imports of natural gas is at once plenary and elastic. It may authorize imports, as it did in Opinion 613, subject to no conditions whatever as to facilities and subsequent use; it may deny import authorization altogether. So long as its conclusion is reasonable and reasonably supported by substantial record evidence, the Commission may also and quite properly adopt a position somewhere between these two poles, granting import authority but subjecting it to "terms and conditions" that it finds "necessary or appropriate" to the

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[35] *See* Flood v. Kuhn, 407 U.S. 258, 281-85 (1972).

[36] FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

[37] FPC v. Louisiana Power & Light Co., *et al.*, 406 U.S. 621, 631 (1972); *see* FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 19-20 (1961).

public interest. More particularly, we can see no objection, in theory, to a Commission determination along the following lines: that, while imports of natural gas are a useful source of supply, their potentially detrimental effect on domestic commerce can be avoided and the interest of consumers protected only if they are subject to comprehensive regulation; such regulation cannot or will not, as a practical matter, be imposed by the states; such imports will, therefore, be in the public interest only if the Commission exercises with respect to them the same detailed regulatory authority that it exercises with respect to interstate commerce in natural gas. In short, we find it fully within the Commission's power, so long as that power is responsibly exercised, to impose on imports of natural gas the equivalent of Section 7 certification requirements both as to facilities and —what we suspect is of more vital concern to the Commission and to petitioners—as to sales within and without the state of importation. Indeed, we think that Section 3 supplies the Commission not only with the power necessary to prevent gaps in regulation, but also with flexibility in exercising that power—flexibility far greater than would be the case were we to hold that imports are interstate commerce, automatically and compulsorily subject to the entire panoply of Section 7's requirements.

III

We think, therefore, that as a matter of jurisdiction the Commission had authority under Section 3 to issue the kind of order before us here. Nor do we think that exercise of that authority over Distrigas' facilities is barred by the Commission's limited disclaimer in Opinion 613. Distrigas argues that once the Commission's previous decision on the jurisdictional point became final and Distrigas consequently acted in reliance thereon in contracting with its customers and constructing its facilities, it was no longer open to the Commission to

change its mind and to assert jurisdiction where it had previously declined to do so. In support of this contention, Distrigas refers us to the Supreme Court's decision in *United States v. Seatrain Lines, Inc.*,[38] in which the Court rejected an attempt by the Interstate Commerce Commission to revoke certification it had previously granted to an interstate water carrier. That decision, however, rested heavily on the Court's doubt that the ICC would have had, in the first instance, statutory authority to take the action it did and on the absence of any statutory provision allowing revocation of water carrier certificates. Here, in contrast, Section 3 expressly allows the Commission to re-examine its decisions authorizing imports and to "make such supplemental order in the premises as it may find necessary or appropriate." Moreover, as we have recounted at some length above,[39] Opinion 613 frankly warned Distrigas that its jurisdictional decision was tentative only, and might be changed should the Commission determine, in the future, that the public interest so required. We think, therefore, that under Section 3 and Opinion 613 itself, any "right" to non-regulation that the Commission's previous decision can be supposed to have vested in Distrigas was entirely contingent on the Commission's continuing to view such non-regulation as in the public interest. If Distrigas relied on an interpretation of Opinion 613 to the contrary, assuming that that decision granted it permanent immunity from regulation, its reliance was misplaced.

We note, however, that Distrigas' argument from reliance comes to us in a highly abstract form. The only obligation placed on Distrigas by the present order is that it file applications under Section 7 for certification

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[38] 329 U.S. 424 (1947).

[39] Text at notes 13-15 *supra*.

of its existing facilities—an obligation with which, we are informed, Distrigas has already complied.[40] Although we recognize that compliance with Section 7's procedural requirements itself entails some costs,[41] we can see no basis for supposing, at this point, that the Commission will refuse certification to Distrigas' facilities or to the contractual arrangements into which it has already entered. In fact, there is reason to suppose the contrary. The Commission has long regarded Section 3's "public interest" standard and Section 7's "public convenience and necessity" standard as substantially equivalent.[42] The hearing examiner expressly recognized this equivalence in his decision approving Distrigas' original application for import authority,[43] in which he gave extensive consideration both to Distrigas' proposed facilities and to its proposed sales; and this decision, on this point at least, was adopted by the Commission in Opinion 613.[44] To some extent, therefore, the Commission must be supposed to have found that Distrigas' facilities and sales, as then contemplated, would meet the "public convenience and necessity" standard of Section 7. Thus, should the Commission eventually decide that those facilities and sales proposed in Distrigas' original application do not now merit Section 7 certification, it would, in our view, be under some burden to justify its decision, on the basis of altered cir-

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[40] It has done so, of course, under protest, its applications contingent upon disposition of this appeal. Letter to the Court Clerk from Counsel for Distrigas, dated Nov. 20, 1973.

[41] *Cf.* Hughes Air Corporation, *et al.* v. CAB, Slip Opinion No. 72-1853, at 17 (D.C. Cir., Dec. 5, 1973).

[42] *See, e.g.*, El Paso Natural Gas Co., 38 F.P.C. 311, 319 (1967); The Montana Power Co., 11 F.P.C. 1, 7 (1952).

[43] Initial Opinion of the Presiding Examiner, *supra* note 7, Joint Appendix at 85-86.

[44] 47 F.P.C. at 766.

cumstances or otherwise. Moreover, in denying Distrigas' application for rehearing, the Commission acknowledged "the problems and equities associated with application of a change of [jurisdictional] policy." [45] Given this acknowledgement, we cannot now assume that the Commission would, in applying Section 7 requirements to Distrigas, fail to abide the principles of fairness implicit in all standards governing exercise of regulatory power.[46]

IV

While we do not believe the Commission in any way estopped from imposing on Distrigas the equivalent of Section 7 requirements, two considerations prevent us, on the present record, from affirming the Commission's order as a proper exercise of its Section 3 authority. First, Section 3 allows the Commission to issue supplemental orders, subjecting previously authorized imports to additional "terms and conditions," only if it does so "after opportunity for hearing, and for good cause shown. . . ." Because the Commission did not invoke Section 3 as its authority for the present order, it did not provide the hearing that that Section expressly mandates. Equally important, while we think that the Commission *may* impose, under Section 3, the equivalent of Section 7 requirements, it may do so only if it affirmatively finds that applying such requirements to imports is "necessary or appropriate" to the public interest. Because the Commission, holding imports included in interstate commerce, viewed its exercise of jurisdiction as mandatory, it did not make the necessary Section 3 determination here. Although it may seem obvious, from the arguments it has presented, that the Commission does consider comprehen-

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[45] Joint Appendix 30.

[46] *See* Amalgamated Meat Cutters v. Connally, 337 F.Supp. 737, 755-58 (D.D.C. 1971), (three-judge court) (Opinion by Leventhal, Circuit Judge).

sive regulation of imports required by the public interest, we cannot assume this to be the case. It is for the Commission in the first instance to determine, after reasoned consideration and on the basis of substantial evidence, whether and in what manner to exercise its flexible Section 3 power, and this determination will in turn be subject to the normal review processes provided in the Act.

We therefore remand the record for supplementation, with directions that the Commission conduct the hearing required by Section 3 and that it supply findings and reasons to support its jurisdictional determination under Section 3's public interest standard. As we observed above, the Commission originally grounded its order on a "commingling" theory. It eschewed that theory, however, in its order denying rehearing. In addition, it failed, both in its original order and in its order denying rehearing, to make any findings of jurisdictional fact or to provide any reasoned analysis to support a conclusion that, because of commingling, the Commission has jurisdiction over Distrigas' facilities and sales. For these reasons, we cannot look to commingling as a ground for affirming the Commission's present order.[47] At the same time, nothing in this opinion precludes the Commission, on remand, from reverting to the commingling theory, rather than turning to Section 3, if it does so in a manner that allows responsible judicial review.

So ordered.

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[47] *See* FPC v. Louisiana Power & Light Co., *et al.*, 406 U.S. 621, 647 (1972); Louisiana Power & Light Co., *et al.* v. FPC, 483 F.2d 623, 631-32 (5th Cir. 1973). *Cf.* SEC v. Chenery Corp. *et al.*, 318 U.S. 80 (1943).

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

Docket Nos. CP73-78, CP73-132, CP73-135

DISTRIGAS CORPORATION

Docket No. CP73-148

DISTRIGAS PIPELINE CORPORATION

Docket Nos. CP73-205, CP73-230

DISTRIGAS OF NEW YORK CORPORATION

ORDER REQUIRING APPLICATION FILINGS

(Issued May 25, 1973)

On September 21, 1972, Distrigas Corporation (Distrigas) filed in Docket No. CP73-78 an application pursuant to Section 3 of the Natural Gas Act (Act) seeking authorization to import up to 2,570,000 cubic meters of liquefied natural gas (LNG) from Algeria to facilities located on Staten Island, New York, and in Everett, Massachusetts between July 1, 1973 and July 1, 1975. The application, and a motion filed in that docket on April 11, 1973, which is the subject of a separate order, contemplate that portions of the imported LNG would be sold for resale to customers located outside the states of New York and Massachusetts.

On November 17, 1972, Distrigas filed in Docket No. CP73-132 an application pursuant to Section 3 of the Act requesting authorization to import approximately 45 trillion BTU of LNG per year to Staten Island and Everett for twenty years. Distrigas is, according to the application, negotiating to sell the LNG to customers in Connecticut, Massachusetts, New Jersey, New York, Pennsylvania and Rhode Island.

Distrigas filed on November 20, 1972, in Docket No. CP73-135 an application pursuant to section 7(c) of the Act seeking authorization to sell gas volumes the importation of which we authorized in our Opinion No. 613, issued March 9, 1972 in *Distrigas Corporation*, Docket Nos. CP70-196, *et al.*[1] Distrigas proposes sales from Everett, Massachusetts to customers in New York, Connecticut, and Rhode Island.

Distrigas Pipeline Corporation filed in Docket No. CP 73-148 on November 29, 1972 an application seeking section 7(c) authorization to construct a pipeline under the Arthur Kill, between Staten Island and Woodbridge, New Jersey, to allow deliveries of imported gas volumes to New Jersey customers.

On February 1, 1973 Distrigas of New York Corporation (DONY) filed in Docket No. CP73-205 an application pursuant to section 7(c) of the Act seeking authorization to sell for resale to New Jersey customers LNG Distrigas seeks to import in Docket No. CP73-78.

On March 7, 1973 DONY filed in Docket No. CP73-230 an application seeking authorization pursuant to section 7(c) of the Act to sell LNG, part of which Distrigas was authorized to import in our above-cited Opinion No. 613, and part of which is the subject of the import application in Docket No. CP73-132. Sales would be

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[1] Rehearing denied in Commission Opinion No. 613-A, *Distrigas Corporation*, Docket Nos. CP70-196, *et al.*, issued June 7, 1972.

made from the Staten Island terminal to customers in New Jersey. The LNG would be transported by the pipeline Distrigas Pipeline Corporation proposes to build in Docket No. CP73-148.

Our Opinion No. 613, referred to above, authorized Distrigas to import LNG from Algeria to the same Staten Island, New York, and Everett, Massachusetts terminals involved in the applications discussed here. We declined in Opinion No. 613 to take jurisdiction over the construction and operation of the proposed LNG terminal, storage and gasification facilities because, at that time, Distrigas proposed to operate primarily in intrastate commerce.

Distrigas' new applications make it clear that the complexion of their proposed operations has changed. New and increased sales to customers outside the states of importation, requiring, for example, construction of the proposed DONY pipeline connecting the Staten Island terminal with New Jersey customers, make it clear that the facilities being constructed on Staten Island, and, apparently, completed at Everett, are facilities to be used for the transportation of natural gas in interstate commerce and the sale of natural gas in interstate commerce for resale. We are, therefore, required by the provisions of the Natural Gas Act to exercise jurisdiction over the construction and operation of the Distrigas terminal, storage, and regasification facilities pursuant to section 7 of the Natural Gas Act. Accordingly, we hereby direct that Distrigas Corporation, or an appropriate subsidiary thereof, file applications pursuant to Section 7 of the Act for the construction and operation of their Staten Island and Everett terminal facilities. The applications discussed above will be considered in conjunction with such section 7 filings.

There are no controverted facts relating to the issue of jurisdiction. Accordingly, no hearing is necessary to resolve an issue of law.[2] If there were factual issues concerning jurisdiction, we would remand for a hearing.

The Commission Finds:

Implementation of the operations proposed by Distrigas Corporation and its affiliates in the above-docketed proceedings make Distrigas Corporation and those affiliates natural gas companies, whose facilities and operations are subject to the Commission's jurisdiction.

The Commission Orders:

Distrigas Corporation or appropriate affiliates thereof, shall file with the Commission applications pursuant to Section 7 of the Natural Gas Act for authorization to construct and operate, as appropriate, their liquefied natural gas terminal, storage, regasification, and related facilities on Staten Island, New York, and Everett, Massachusetts.

By the Commission. Commissioner Brooke dissenting filed a separate statement appended hereto.

[SEAL]

Mary B. Kidd,
Acting Secretary.

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[2] *Cf. Citizens for Allegan Co.* v. *F.P.C.*, 414 F.2d 1125 (D.C. Cir. 1969).

BROOKE, Commissioner, *dissenting*:

By requiring the Distrigas Corporation to file for Section 7 certification of its LNG terminal, storage and processing facilities at Everett, Massachusetts, and Staten Island, New York, the Commission is enunciating a summary reversal of the findings and conclusion of Opinion Nos. 613 and 613-A that the Distrigas facilities were nonjurisdictional.

I am concerned that in its haste to reverse the Commission chose not to elaborate on its reversal nor to comment on the lengthy and substantive justification underlaying the judgment of Opinion Nos. 613 or 613-A.

As a matter of fact, there are passages in the instant order which distort and misinterpret the intent of the basic opinion. It is distasteful to be told that what one said is not what one meant—but there is no misunderstanding the clear language of Opinion Nos. 613 and 613-A.

On Page 2 of the order, it is observed that "We declined in Opinion No. 613 to take jurisdiction over the construction and operation of the proposed LNG terminal, storage and gasification facilities because, at that time, Distrigas proposed to operate primarily in intrastate commerce."

This construction of Commission intent is then followed by a few analytical sentences which somehow reach the surprise conclusion that Distrigas plans to make interstate, as well as intrastate sales; therefore, the facilities have to be certificated.

Admittedly, the Commission did stress the intrastate nature of the original Distrigas project in discussing the capital attractiveness of a non-regulated enterprise, but to infer conclusively that non-jurisdiction was based solely on the intrastate character of project is a gross misinterpretation.

The Commission was fully aware of the possibility of interstate sales when Opinion No. 613 issued and commented on this potential at various points in the document.

The Commission there made two significant findings. First, it held that the Distrigas facilities were to be used to receive foreign commerce and that the importation and exportation of natural gas is not interstate commerce as used in the Natural Gas Act. Second, the Commission stated that: "It is our opinion that our jurisdiction attaches at the tailgate of the LNG tanks when the gas or LNG being sold is destined for resale in interstate commerce, . . ."

A fair interpretation of this language would be that regardless of the destination—intrastate or interstate—the terminal facilities are not jurisdictional under the Natural Gas Act and do not require an FPC certificate. It is wholly inaccurate to attribute a finding of non-jurisdictionality solely to the fact that initial operations would be intrastate.

Frankly, I do not know how the Commission could have made it clearer in Opinion No. 613 that Distrigas would require Section 7 approval for interstate sales.

On Page 5 of Opinion No. 613, the Commission said: "If Distrigas wishes to move that imported gas in interstate commerce, or into an interstate system, then certification from this Commission is required."

On Page 6: "We remind that Distrigas must submit, and we shall order Distrigas to submit, tariffs to the Commission for approval pursuant to the Natural Gas Act for the natural gas which is to be sold in interstate commerce for resale."

In its findings on Page 14, the Commission found that "Distrigas is a 'natural gas company' within the mean-

ing of the Natural Gas Act, subject to the jurisdiction of this Commission only in regards to its transportation or sale for resale of gas in interstate commerce and all other activities of Distrigas are outside our jurisdiction."

On Page 14, Ordering Paragraph (A) conditioned approval of the importation "upon Distrigas Corporation filing tariffs with respect to the interstate transportation and sale for resale of the LNG. . ."

The Commission also reminded in Opinion No. 613 of its continuing review authority of an approved importation or exportation under Section 3, citing that "we '. . . may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.' "

In the instant order, on Page 2, the Commission concludes:

"We are, therefore, required by the provisions of the Natural Gas Act to exercise jurisdiction over the construction and operation of the Distrigas terminal, storage and regasification facilities pursuant to Section 7 of the Natural Gas Act." The finding paragraph on Page 3 is even more explicit.

This peremptory judgment wipes out Opinion No. 613, and, as such, is a supplemental order within the meaning of Section 3, but it is being issued without opportunity for hearing or for good cause shown.

The applications in this case present no new facts nor legal situations not considered in Opinion Nos. 613 and 613-A which would now change my position. No judicial appeal was taken of Opinion Nos. 613 and 613-A, and they are now final and non-appealable.

As far as the related cases are concerned, I would set the applications to import, to sell and to construct the pipeline for expeditious hearing, and would not, of course, require any filing for facilities covered in Opinion No. 613.

/s/ Albert B. Brooke, Jr.
ALBERT B. BROOKE, JR.
Commissioner

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

Docket Nos. CP73-78, CP73-132, CP73-135

DISTRIGAS CORPORATION

Docket No. CP73-148

DISTRIGAS PIPELINE CORPORATION

Docket Nos. CP73-205, CP73-230

DISTRIGAS OF NEW YORK CORPORATION

ORDER DENYING REHEARING

(Issued June 20, 1973)

On May 25, 1973, we issued an order requiring Distrigas Corporation (Distrigas) and its appropriate affiliates to file for Section 7 certificate authorization to construct and operate LNG terminal, storage, regasification and related facilities at Staten Island, New York and Everett, Massachusetts. On May 29, 1973, Distrigas, Distrigas of Massachusetts Corporation (DOMAC) (previously not a party to these proceedings) and Distrigas of New York Corporation (DONY),[1] filed an application for rehearing[2] of our May 25 order and a motion for stay

[1] DONY is the owner of the terminal at Staten Island and DOMAC is the owner and operator of the terminal at Everett.

[2] In the alternative, a declaratory order was sought to the effect that the May 25 order is not intended to retroactively modify Opinion Nos. 613 and 613-A, or to interfere with the authorizations granted therein.

of that order pending decision on the application for rehearing.[3] It is argued that our May 25 order has reversed Opinion No. 613, 47 FPC 752 (1952),[4] deprives petitioners of property without due process of law and violates Section 3 of the Natural Gas Act. For the reasons hereinafter stated, we deny rehearing. Our May 25, 1973 order applies to the construction of the Staten Island terminal and to the on-going operation of the Everett terminal. On our motion, we herein stay our May 25 order for sixty days from the issuance of this order denying rehearing so that petitioners may file a petition for review of these orders under Section 19 of the Natural Gas Act.

Opinion No. 613 found jurisdiction under Section 3 of the Natural Gas Act over the importation of LNG and under Section 7 for the sales for resale and transportation in interstate commerce of LNG. 47 FPC at 756, 758-760, 765. No certification was required for the facilities of Distrigas for storage and gasification or where the sales and transportation were solely intrastate, i.e. all within the states of Massachusetts or New York. 47 FPC at 758, 765. There were two dissenting statements which would have found jurisdiction over the terminal, storage and regasification facilities. 47 FPC at 778-780 and 781-784.

In Opinion No. 613-A, the majority stated (slip op. at 4):

> We reiterate that intrastate sales and transportation do not need certification from this Commission and, *to the extent that LNG import projects are intrastate in nature*, it is the intent of the Commission not to regulate them. However, to move that

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[3] On June 11, 1973, we issued an order granting the motion for stay pending further Commission order.

[4] Rehearing denied, Opinion No. 613-A, June 7, 1972.

> imported gas in interstate commerce or into an interstate system does require certification from this Commission. (Emphasis supplied.)

Opinion Nos. 613 and 613-A involved the first importation of LNG in large quantities over an extended period of time; however, the LNG was to be primarily used for peak shaving. The majority indicated that

> * * * the Commission would caution that this decision represents only the first step in the development of a comprehensive Commission policy on long-term imports of LNG * * *. 47 FPC at 760.

On June 28, 1972, in Opinion No. 622, the Commission authorized the first large volume importation of LNG for base-load purposes. In that opinion, the Commission granted import authorization to the applicants and also issued Section 7 certificates to the same applicants for the construction and operation of the terminal, regasification and storage facilities[5] (slip op. at pp. 5, 31). It was noted in Opinion No. 622 that "This is unlike *Distrigas*, where such facilities were largely used for the transport or sale of LNG in intrastate operations." (Opinion No. 622, note 6).[6] There was one dissent in Opinion No. 622 to the Section 7 jurisdiction over the LNG terminal facilities (slip op. at 35-36). The order on rehearing, Opinion No. 622-A, issued October 5, 1972, did not alter the Section 7 authorizations required for the terminal, regasification, and storage facilities.

On March 30, 1973, in Docket No. CP71-289, we amended the Section 7 certificates issued in Opinion Nos.

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[5] It should be noted that Distrigas was the importer only in Opinion No. 613 and that its affiliates were the operator-owners of the proposed terminals.

[6] However, much of Southern Energy's sales would be intrastate, while certification was granted for all the facilities.

622 and 622-A, as they related to Cove Point, Maryland, to permit substitution of a tunnel for a trestle to transport the LNG from the offshore pier to the onshore tanks.

The preceding references reflect the modifications made by the Commission in articulating a uniform jurisdictional policy with respect to LNG imports. In Opinion No. 613, the so-called "tailgate policy" was enunciated wherein "jurisdiction attaches at the tailgate of the regasification plant and the tailgate of the LNG tanks when the gas or LNG being sold is destined for resale in interstate commerce". 47 FPC at 758. Opinion No. 622 reached a contrary result. It was always conceded that Distrigas would be required to obtain certificate authorization for the transportation and sale for resale of LNG from Everett and Staten Island. However, the record in that proceeding indicated that the majority of such sales would be intrastate in character. Thus, unresolved was the question as to what proportion of sales destined for interstate commerce are required before the facilities necessary to effectuate said sales become jurisdictional for purposes of Section 7.

There are at least two basic legal theories which could form the basis of a uniform jurisdictional policy with respect to LNG imports: "interstate commerce" and the "commingling" theories, both arising from Section 7 of the Act.

Interstate Commerce

Section 1(a) of the Natural Gas Act states that:

> * * * Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

This declaration of purpose must be read in conjunction with other pertinent statutory provisions. A "natural gas company" is one "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale". Section 2(6) of the Act. "Interstate commerce" is defined in Section 2(7) as

> commerce between any point in a State and any point outside thereof * * * but only insofar as such commerce takes place within the United States.

Distrigas is a "natural gas company" and as the importer is involved in the transportation and sale of natural gas for resale.[7] The LNG commerce takes place within the United States, i.e. between a point within the state of importation (New York and Massachusetts) and a point outside thereof. From the time LNG enters the United States, interstate commerce, for purposes of Section 2(7) has occurred, and Section 7 certificate authorization is required. To the extent the *Border*[8] decision could compel a contrary result, that holding is in error.[9]

Commingling

In this case, and in the normal LNG import, the LNG travels from the ship's rail in one stream to LNG storage facilities and is thereafter commingled with gas destined for interstate commerce. Accordingly, Section 7 jurisdiction extends to all the facilities necessary to effectuate the interstate transportation and sale.[10]

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[7] In Opinion No. 622-A, El Paso Algeria was neither the importer nor a natural gas company for purposes of the Act. Mimeo at 4.

[8] *Border Pipeline Co.* v. *F.P.C.*, 171 F.2d 149 (D.C. Cir. 1948).

[9] See authorities cited in dissent to Opinion No. 613. 47 FPC at 783-784.

[10] Id. 47 FPC at 779 and authorities cited in note 9.

Under the "commingling" theory, some interstate transportation or sale for resale of LNG from the terminal facilities would be required as a predicate for Section 7 jurisdiction over the facilities required to effectuate that sale. In other words, if we authorize an LNG import under Section 3 of the Act, but at the time of the authorization the sales and transportation will be made solely within the state of importation, i.e. intrastate, no Section 7 authorization would be required. On the other hand, if interstate transportation or sales for resale are contemplated at a later date, Section 7 authorization would be required not only for the transportation or sale for resale, but also for the facilities (LNG terminal, storage and regasification) to effectuate that transaction. In the latter instance, the Commission would have to look to the traditional tests in certificating facilities, e.g. economic feasibility, adequacy of supply, financing, costs; however, such facilities would be already constructed and operational. Such a result would seriously impair our regulatory responsibilities.

Under the "interstate commerce" theory, the issue of future intrastate or interstate sales or transportation from LNG facilities becomes irrelevant for purposes of Section 7, inasmuch as interstate commerce is found to have commenced from the time LNG enters the United States and no subsequent interstate transaction is required for purposes of Section 7. Thus, irrespective of the destination of LNG from regasification facilities within the state of importation, Section 7 authorization is required at the outset for such facilities as well as any sale or resale transportation therefrom.

Conclusion

As the Court of Appeals for District of Columbia Circuit has stated:

> • • • one of the signal attributes of the administrative process is flexibility in reconsidering and reforming of policy. *City of Chicago* v. *F.P.C.*, 385 F.2d 629, 637 (D.C. Cir. 1967, cert. denied 390 U.S. 945 (1968).

Because of the experimental nature of our relatively recent experience with large volume LNG imports to supplement our traditional domestic gas supply sources, we necessarily require some latitude in developing a definitive, uniform jurisdictional policy.[11]

We herein adopt the "interstate commerce" theory as our jurisdictional policy with respect to LNG imports. Any importer of LNG is required to obtain Section 7 authorization to construct and operate LNG terminal, storage, regasification, and related facilities. Section 7 authorization is also required to make any sales for resale or transportation of LNG, either within or outside the state of importation. Section 3 authorization for the importation of the LNG is of course still required. Accordingly, Distrigas and its appropriate affiliates are required to seek additional Section 7 authorizations, and to the extent Opinion Nos. 613 and 613-A are inconsistent, they are modified and reversed accordingly.

We recognize that Distrigas has made substantial investments in reliance upon Opinion Nos. 613 and 613-A, with the Everett terminal constructed and operational and the facilities at Staten Island under construction. The Section 7 applications required herein will be measured against the traditional "public convenience and necessity" tests of the Natural Gas Act. While we intend to apply the holding herein to Distrigas, we are

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[11] Cf. *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). See also *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968); *General Telephone Co. of the Southwest* v. *F.C.C.*, 449 F.2d 846 (5th Cir. 1971).

not unmindful of the problems and equities associated with application of a change of policy. However,

> [c]omprehensive regulation of LNG is inextricably connected to our responsibility to the Nation's gas consumers, particularly where, as here, we determine in the first instance if, and how much, LNG is to be imported. It is not only contrary to the national interest to certify this project and then relinquish all responsibility and control over the delivered gas, but it is an abdication of our regulatory responsibility to develop policies which will foster the dedication of new gas reserves to the jurisdictional markets. 47 FPC at 779.

We reiterate our view that no further hearings are required to determine a legal issue such as we have resolved herein. There are no factual issues which need be adjudicated prior to such a determination.

The Commission orders that:

(A) The application for rehearing filed on May 29, 1973, by Distrigas, DOMAC and DONY is denied.

(B) Distrigas or its appropriate affiliates, e.g. DOMAC, DONY, shall file with the Commission applications for consideration and determination under Section 7 of the Natural Gas Act for authorization to construct and operate, as appropriate, their LNG terminal, storage, regasification, and related facilities at Staten Island, New York and Everett, Massachusetts.

(C) Ordering paragraph (B) above is herein stayed until Distrigas or its appropriate affiliates files a petition for review of our May 25, 1973 order and this order denying rehearing, or for a period of sixty days from the issuance of this order, whichever is the lesser time.

(D) Our order of June 11, 1973, which granted the motion for stay of May 29, 1973 is vacated as moot.

By the Commission. Commissioner Brooke dissenting, filed a separate statement appended hereto.

Kenneth F. Plumb,
Secretary.

Docket Nos. CP73-78, CP73-132, CP73-135

DISTRIGAS CORPORATION

Docket No. CP73-148

DISTRIGAS PIPELINE CORPORATION

Docket Nos. CP73-205, CP73-230

DISTRIGAS OF NEW YORK CORPORATION

BROOKE, Commissioner, dissenting:

Denial of the Distrigas application for rehearing of the Commission's May 25 order directing Distrigas to file for Section 7 certification of facilities found in Opinion No. 613 to be non-jurisdictional perpetuates a gross injustice and a denial of due process to which I must continue to record a most vigorous dissent.

Distrigas further petitioned for a declaratory order, in the event rehearing was refused, clarifying the impact of the May 25 edict on Opinion No. 613, particularly as to the LNG imports authorized by that order and facilities being constructed or operated at Staten Island or Everett. If I understand the order's response to Distrigas' request that Opinion Nos. 613 and 613A not be retroactively altered, Distrigas is being told that, in effect, the prior opinions and orders never existed—that it is now being required to obtain certain certificates which should have issued in the first instance.

This puts the company in a terrible bind, and it points out quite properly that "the rights and obligations determined by that Opinion are therefore firm, fixed and final. They are no longer subject to review in the Commission or elsewhere." Then Distrigas observed, "It is shocking for the Commission now to attempt to destroy

by administrative fiat the rights thereby vested in Petitioners." I agree.

Distrigas has relied in good faith on a valid order of this Commission, and an investment approximating $120 million is now being jeopardized by a summary and peremptory reversal of Opinion No. 613. Holders of FPC licenses or certificates must be in position to rely on and trust in the validity of our orders. The orderly growth and operation of the natural gas industry is sustained by confidence in FPC actions. Admittedly, there may be no new factual or legal issues to be explored, but Distrigas should be afforded the opportunity in an appropriate proceeding to demonstrate how reversal of Opinion No. 613 affects it.

For the purposes of this dissent, I share the misgivings expressed in the Distrigas application for rehearing, and repeat the statements in my dissent to the Commission's May 25 order. The Commission has difficulty in squaring Opinion No. 613 with Opinion No. 622 in delineating "a comprehensive Commission policy on long-term imports of LNG," and continues to ignore the plain language in Opinion No. 613.

Rather than further rebutting this rhetorical sleight of hand here, I am attaching as Appendix A a copy of the Majority opinion in Opinion No. 613. However, there are a few observations in the instant order meriting comment.

In referring to Opinion No. 613 on Page 2, the order observes, "There were two dissenting statements which would have found jurisdiction over the terminal, storage and regasification facilities." No mention is made of the fact that Opinion No. 613 was adopted by a 3 to 2 vote. The two dissenters now constitute the majority because the Commission had only three members when a 2 to 1 decision was reached.

Then, on Page 3, the order strains through a quite tortuous interpretation of why a different Commission decision on jurisdictionality of facilities issued in Opinion No. 622 and why, somehow, this policy determination is now conclusive.

The Majority again fails to delineate the Commission line-up. Opinion No. 622 was decided by a four-member Commission. To be true, there was only one dissent to finding the terminal and associated facilities jurisdictional, but the order fails to explain the accommodation necessary to reaching a firm decision on this issue.

My statement of concurrence and dissent to Opinion No. 622 of June 28, 1972, copy attached as Appendix B, explains my support of certification in the *Columbia LNG* case. Such a position, in my opinion, was necessary to a clear-cut majority on jurisdictionality of the terminal facilities. A 2-to-2 vote on this issue may well have killed the entire project at the outset and denied to thousands of consumers the benefits of badly needed supplemental sources of natural gas.

I do, of course, disagree with the order's discussion of "interstate commerce" and "commingling." As a matter of fact, the rationale of the analysis is difficult to follow. If my understanding is correct, FPC jurisdiction will be imposed on "any importer of LNG" and to every LNG project in the United States, including those wholly intrastate in character and regardless of whether the ultimate use of the LNG is for utility or non-utility purposes.

On Page 6, a terse quotation, excerpted from the *City of Chicago* case, is supportive of the position that administered flexibility in "reconsidering and reforming of policy" justifies denial of due process and deprivation of property.

The citation is correct, as far as it goes, but the very next sentence in the same paragraph contains this caution:

> ". . . What is required by the Rule of Law is that agency policies and standards, whether or not modifications of previous policies, be reasonable and nondiscriminatory, and flow rationally from findings that are reasonable inferences from substantial evidence."

It is obvious that reversal of Opinion No. 613 is predicated entirely on a different interpretation of the "substantial evidence" in the original case. The impact of this switch is, indeed, grossly unreasonable and discriminatory because Distrigas is being exposed to the liability of risks undertaken in good faith and in reliance on a valid Commission order.

Significantly, the very next paragraph in the same *City of Chicago* case states:

> "(9) There is perhaps one additional requirement inserted in case of a change in policy, that the agency give due consideration to the equities, if any, arising out of commitments based on previous rulings. (Footnote omitted)

The Majority generously recognizes "the problems and equities associated with application of a change in policy." I'm sure Distrigas appreciates this sympathetic understanding, but feel that it would prefer to have a chance to seek more substantive relief.

In so far as the instant order grants a stay to permit Distrigas to take judicial appeal, I concur, but the remainder falls leagues short of according fair play and due process to which Distrigas is entitled at this point. Presumably, Distrigas will be accorded its en-

titlement to a hearing on its Section 7 certificate applications. In view of the Majority's strong pronouncements, such a proceeding may amount to nothing more than a charade.

/s/ Albert B. Brooke, Jr.
ALBERT B. BROOKE, JR.
Commissioner

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

ENVIRONMENT—GAS SUPPLY—IMPORTATION OF LIQUEFIED NATURAL GAS (LNG)—JURISDICTION—NATURAL GAS ACT, SECTIONS 3, 7—PUBLIC INTEREST—TARIFFS

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

Docket Nos. CP70-196, CP72-165, CP72-167 and CP72-168

DISTRIGAS CORPORATION

OPINION NO. 613

OPINION AND ORDER GRANTING AUTHORIZATION TO IMPORT LIQUEFIED NATURAL GAS (LNG)

(Issued March 9, 1972)

WALKER, Commissioner:

1. On February 17, 1970, Distrigas Corporation (Distrigas) applied under Section 3 of the Natural Gas Act for authorization to import up to six (amended September 29, 1970 to fourteen) shiploads of liquefied natural gas (LNG) per year for 20 years from Algeria. Algeria's Hassi R' Mel Field is the source of the natural gas which is to be liquefied and exported to the United States. The ship Descartes, an integrated tank-type LNG ship, will be used almost exclusively to transport the Algerian

gas for Distrigas' account. The LNG is to be delivered to Distrigas at proposed facilities located in Everett, Massachusetts, and Staten Island, New York. Distrigas takes title to the LNG at the ship's flange at the point of delivery in the United States.

2. From these terminals, Distrigas will sell the LNG, as liquid, to utilities f.o.b. the plant and will provide barge delivery at an additional charge. The utilities may either store the LNG in their own storage tanks or, under a higher rate schedule, obtain storage services from Distrigas. Through a combination of its own facilities and those of its utility customers, Distrigas will be able to offer a highly versatile LNG peak-shaving program to customers located between Baltimore, Maryland, and Portland, Maine, and also to provide a dependable supply and distribution network for the development of the non-utility uses of LNG (Exh. 42). Distrigas will provide vaporization capability for those utilities which elect to receive their LNG in its gaseous state.

3. The capital structure of Distrigas will consist of approximately 40 percent equity and 60 percent debt. Debt will consist primarily, if not entirely, of long-term bank loans on which interest charges are expected to be about 9 percent per annum. The capital stock will be owned entirely by the Cabot Corporation and Gazocean S.A., which have undertaken a long-term LNG import program. Cabot Corporation and Gazocean formed the Distrigas Corporation in order to implement this program (Exh. 42). The balance sheet of Distrigas (Exh. 21) shows total assets of $51,568,000. The cost of facilities at Everett and Staten Island, plus the barge, total $51,517,000 (Exh. 12).

4. Seven distributors, all of whom testified at the hearing in support of granting this application, have given Distrigas firm letters of intent to purchase LNG, and Distrigas has agreed to sell LNG to these customers

for 20 years. On the record, Distrigas proposed initial rates for this service at from 104-164 cents/MMBtu at Everett and from 107-174 cents/MMBtu at Staten Island (Tr. 77, 78). Distrigas' target rate of return on equity is estimated at 17 to 18 percent (Tr. 1421). All seven distributors which have signed firm letters of intent testified that the rates and conditions of purchase of LNG from Distrigas were competitive with, or preferred to, the rates and conditions for other alternative peak-shaving services.

5. In his Initial Decision issued June 14, 1971, Presiding Examiner Nahum Litt authorized Distrigas, subject to specified conditions, to import LNG from Algeria to the proposed facilities herein, and he concluded, *inter alia*, that (a) LNG is natural gas, as defined by Section 2(5) of the Natural Gas Act, over which the Commission has jurisdiction to the same extent that it has jurisdiction over the sale and movement of other natural gas (Initial Decision, mimeo, p. 37); (b) that to the extent Distrigas proposes to transport natural gas by barge or sell it in interstate commerce for resale, it is a natural gas company (Distrigas so admits and has requested a certificate of public convenience and necessity under Section 7 of the Act (Ibid p. 45)); and (c) that the importation or exportation of natural gas is not interstate commerce as those words are used in the Natural Gas Act. Therefore, for the latter purposes, and for its intrastate sales and other operations, Distrigas is not a natural gas company as that term is used in the Act and is not subject to the requirements of the Act that apply to natural gas companies (Ibid p. 51).

6. We agree with the Examiner's grant of authorization to Distrigas for the importation of LNG, and shall discuss our reasons more fully below. We also agree with the Examiner's conclusions under (a), (b) and (c) above. It is our opinion that the proposed activity of

Distrigas is akin to that of a producer or gatherer of natural gas and its sales in interstate commerce of natural gas for resale are subject to the jurisdiction of and regulation by this Commission.[1] The importation or exportation of natural gas is patently the jurisdiction of this Commission under Section 3 of the Act. The transportation of natural gas by barge we specifically do not rule upon at this time since such is the subject in a proposed rulemaking of which notice was published on January 15, 1970 in Docket No. R-377. In sum, our jurisdiction includes (1) the authorization or denial of importation or exportation of LNG and (2) the regulation of sales for resale in interstate commerce of LNG or regasified LNG, with the possible exceptions to be decided in our rulemaking in Docket No. R-377. But to continue the analogy of Distrigas to a producer or gatherer, Distrigas' facilities and its transport or sales of LNG which are solely intrastate are outside our jurisdiction and therefore do not require our certification.

7. Of some 40 intervenors, briefs on exceptions to the Initial Decision were filed only by Amoco International Oil Company (Amoco), Distrigas, Philadelphia Gas Works Division of UGI (PGW), Shell Oil Company (Shell), Superior Oil Company (Superior), and Staff. Except for PGW and Superior, all of the others named above plus Esso LNG, Inc. (Esso) filed briefs opposing exceptions. The matter is before us on the exceptions.

8. Amoco in its brief opposing exceptions (pp. 4, 5) supports the Examiner's holding that importation of natural gas is not interstate commerce as those words are used in the Natural Gas Act; and that for these purposes, and intrastate sales, the importer is not a natural gas company or otherwise subject to the Act's

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[1] *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, 677 (1954 Phillips I).

requirements. As we indicated above, we agree with the Examiner's decision and Amoco's construction thereof.

9. Superior argues that on the basis of the 5th Circuit's holding in the *Florida Parishes*[2] case, the entire operation of Distrigas and all aspects thereof are subject to the jurisdiction of the Commission (Superior brief on exceptions p. 15). We view the importation of LNG as a separate and separable operation from the subsequent storage, gasification, transportation or sale of LNG. Therefore, to the extent that these subsequent acts occur solely within the state of importation, they are beyond the construction of *Florida Parishes* and *Lo Vaca*[3] and are outside of our jurisdiction.

10. Superior also argues that the findings and conclusions of the Examiner with respect to the factors of public convenience and necessity are deficient. Superior attacks the current nationalized status of the French-owned companies that formerly held the concession for and operated the Hassi R' Mel Field and cited a history of unilateral breaches or amendments of long-term contracts by the Algerian government. Superior concludes that to permit portions of the East Coast to become dependent on Algerian LNG for existing baseload supplies and for the expansion of existing markets raises a public interest issue from the national security viewpoint. The record shows that the Department of Defense is not aware of any existing reason to object to the importation of the LNG. The Department of State also has no objection to the importation of the LNG. We find that the quantities of gas proposed for import herein are not so substantial as to pose a grave danger to the national security of the United States.

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[2] *Louisiana Public Service Commission* v. *F.P.C.*, 359 F.2d 525 (1966).

[3] *California* v. *Lo Vaca*, 379 U.S. 366 (1965).

11. It is Staff's contention that the Commission can and should assert jurisdiction over Distrigas' facilities and sales according to the mandates of *Florida Parishes* and similar decisions (Staff brief on exceptions p. 19). It is Staff's position that Distrigas is a "natural gas company" by virtue of its importation of natural gas, and that all of its facilities and operations, including sales in the state of importation, are thus subject to Commission jurisdiction (Ibid p. 4); that importation of natural gas, constitutes interstate commerce as defined by Section 2(7) of the Act, and that Distrigas will be a "natural gas company" within the meaning of Section 2(6) by virtue of its importation of LNG, with all of its facilities, sales and operations subject to Commission jurisdiction. It is clear that we do not agree with Staff's contentions.

12. Esso disagrees with the argument of Superior and Staff and supports the Examiner's conclusions. PGW in its brief on exceptions supports the Examiner's conclusion that the Commission has jurisdiction over LNG. Distrigas in its brief opposing exceptions says there is no "commingling" of gas moving in interstate commerce as in the *Florida Parishes* case and that all of the LNG to be imported by Distrigas will enter the Distrigas tanks and other terminal facilities in a single stream of foreign commerce. Distrigas says the only facility to be used by it for interstate transportation or the interstate sale of LNG or natural gas is the LNG barge for which Distrigas has requested a certificate be issued and the Examiner has so recommended (pp. 4, 5, 6). It is reiterated that this Commission has jurisdiction over the importation and exportation of natural gas. If Distrigas wishes to move that imported gas in interstate commerce, or into an interstate system, then certification from this Commission is required. Intrastate sales and transportation do not need our certification. We

must again state that the matter of barge transportation of natural gas is reserved for the proposed rulemaking and subsequent consideration, if necessary.

13. Shell argues that LNG is not natural gas and that to so hold will not create an "attractive gap" in the Commission's administration of the Natural Gas Act. Shell would have Commission jurisdiction attach to the sale of natural gas for resale at the time that the product becomes gaseous in form, that is, at the tailgate of the regasification plant. Shell, while agreeing with the Examiner's conclusion that Commission jurisdiction under Section 3 attaches to all imports of natural gas and LNG, suggests that in order to prevent the existence of the "attractive gap", regulation of the transportation and sale of LNG as a liquid is and should be completely outside the Commission's jurisdiction. We reject Shell's contention that LNG is not natural gas but accepted and elaborate on Shell's tailgate concept. It is our opinion that our jurisdiction attaches at the tailgate of the regasification plant and the tailgate of the LNG tanks when the gas or LNG being sold is destined for resale in interstate commerce, except as may be conditioned in our rulemaking in Docket No. R-377.

14. Superior contends that if a certificate is issued at this time, the Commission will have to approve rate increases for the current service, and/or approve an expansion of the project because of the increased costs of foreign LNG. We remind that Distrigas must submit, and we shall order Distrigas to submit, tariffs to the Commission for approval pursuant to the Natural Gas Act for the natural gas which is to be sold in interstate commerce for resale. Should the rates and charges under the submitted tariffs prove unreasonable and unjust, it will be our duty to say so and to apply the necessary remedy.

Foreign Commerce and Importation

15. Patently, the importation or exportation, sale for resale or transportation of natural gas, in this instance, LNG, in interstate commerce, is the province of this Commission under Sections 3 and 7 of the Natural Gas Act. We concur with the Examiner, however, that the importation or exportation of natural gas is not interstate commerce as those words are used in the Natural Gas Act. In this case the LNG and title thereto are delivered to Distrigas at facilities in Massachusetts and New York. We find at the time and point of delivery to these facilities foreign commerce ceases. The *Border* [4] case is argued to us as controlling here. We agree insofar as Border established that the importation or exportation of natural gas is not interstate commerce as those words are used in the Natural Gas Act. We further agree with the Examiner in his finding that Distrigas is the importer in this case. The Supreme Court in *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 661 (1945) held that the "Petitioner's contracts of purchase are the inducing and efficient cause of bringing the merchandise into the country, which is importation. Examination of the documents and consideration of the course of business can leave no doubt that the petitioner not only causes the importation but that the purpose and necessary consequences of it are to supply petitioner with the raw material for its manufacture of cordage at its factory in Ohio." Here, Distrigas' contracts of purchase are the inducing and efficient cause for bringing the LNG into the country making Distrigas the importer.

Jurisdiction

16. We agree with the Examiner that LNG is natural gas as defined by Section 2(5) of the Act and that the

[4] *Border Pipe Line Company* v. *F.P.C.*, 171 F.2d 149 (D.C. Cir. 1948).

Commission has jurisdiction over the sale and transportation of LNG to the same extent as it has jurisdiction over the sale and movement of other natural gas, excepting the limitations reserved in our proposed rulemaking.

17. Distrigas correctly views its sales at the Everett Terminal to those distributors located outside the State of Massachusetts and the sales (in the initial stages) from the Everett Terminal to Brooklyn Union Gas Company (which uses the natural gas obtained from Algonquin, a natural gas company) as sales of natural gas in interstate commerce for resale and hence as jurisdictional (Tr. 1314). Distrigas also views the transportation of the LNG by barge in interstate commerce as jurisdictional, but again we note that this item is reserved to the rulemaking referred to above. Finally, Distrigas maintains that there is no commingling as in the *Florida Parishes* case.

18. The Department of Transportation advised that the applicant must, under Section 7 of the Natural Gas Pipeline Safety Act, certify compliance with Federal and other applicable safety standards. We agree.

19. The Examiner found that the proposed facilities will not significantly affect the quality of human environment and will not have a deleterious effect upon the environment. However, the Department of the Interior under date of November 8, 1971, has raised questions about the Environmental Impact section suggesting it is too limited in several respects and that satisfactory answers be supplied. The Commission has undertaken an independent and comprehensive evaluation of the environmental effects of this project. A copy of our final environmental statement is attached. Based on our independent evaluation, we find that the proposed LNG terminal facilities will have a minimal and a short term effect on the environment. Moreover, such environmental impact appears minor in comparison with the environ-

mental and other benefits which will be derived from the increased availability of natural gas made possible by this project.

20. In determining whether an applicant's proposal to import natural gas is consistent with the public interest, the Commission gives consideration to factors ordinarily considered in connection with applications for certificates of public convenience and necessity. The Examiner found that the importation of natural gas proposed by Distrigas will not be inconsistent with the public interest subject to certain conditions. We concur with the reasons the Examiner gave in finding Distrigas' proposal in the public interest.

Discussion and Conclusions

21. This is the first application to reach the Commission where a U. S. company has proposed to import large quantities of foreign LNG for an extended period of time. To that extent, the Commission is establishing policy for a new arm of the natural gas industry which promises to become increasingly important in the future. At the same time, the Commission would caution that this decision represents only the first step in the development of a comprehensive Commission policy on long-term imports of LNG and that each of the early applications for such projects will be carefully and separately analyzed and will be decided on its individual merit.

22. In the case before us, the Commission has affirmed the Examiner's decision that LNG is natural gas, that we do have authority to approve or disapprove the import of LNG, that the proposed LNG import, in this instance, is in the public interest, and that the sale for resale of this LNG, in either liquid or gaseous form, in interstate commerce is under our jurisdiction, with the possible exceptions set forth in our Notice of Proposed Rulemaking in Docket No. R-377. Moreover, we affirm

the Examiner's decision that storage of this LNG, the regasification of this LNG, the sale of either the liquid or regasified LNG in the state of importation and the facilities and activities related thereto are neither in foreign or interstate commerce and are therefore outside of our jurisdiction.

23. It is acknowledged that the Commission could, under Section 3 of the Natural Gas Act, take jurisdiction at the ship's flange at the point of delivery in the United States as the "terms and conditions" for authorizing this import of LNG. We elect not to do so. In this case, the controlling question is not *can* we take jurisdiction at that point, but rather *should* we. We find we should not. Our finding on this issue is based on a careful calculus of what we find will best serve the public interest in both the short and the long term.

24. The United States is running dangerously short of natural gas. In 1970, the lifetime of the nation's proven reserves (excluding Alaska) had declined to 11.9 years.[5] This was down from a reserves-to-production ratio of 20.1 as recently as 1960 and down from a ratio of 26.5 in 1950. In 1968, for the first time since comprehensive data were compiled, more gas was produced and consumed in the United States than was found and added to reserves. The same condition prevailed in 1969 and 1970, so that the nation produced and consumed about twice as much gas between 1968 and 1970 as was discovered.

25. The decline in the production life of the nation's total proved reserves was paralleled by the decline in reserves for the interstate market as reported (Form

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[5] Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada and United States Productive Capacity as of December 31, 1970 (Vol. 25, May 1971), American Gas Association, American Petroleum Institute and Canadian Petroleum Association, Part II, Table No. 1, p. 114.

15) to the Commission by the interstate pipelines. In 1970, the reserves-to-production ratio for the interstate pipeline system stood at 12.3.[6] This was down from 16.8 as recently as 1967 and down from 20.2 in 1963. Beginning in 1968, production of gas from the interstate reserves exceeded new reserves found and dedicated to the interstate market. The situation deteriorated substantially between 1968 and 1970 with production exceeding newly found and dedicated reserves by 3.4 trillion cubic feet in 1968, 7.3 trillion cubic feet in 1969 and 17.9 trillion cubic feet in 1970.

26. The production and deliverability problems associated with the decline in reserves has now reached such critical proportions that the interstate pipeline system cannot satisfy the requirements of its existing customers. As of February 7, 1972, six major pipelines were curtailing service to their customers. The average daily curtailment (excluding an additional 15 percent temporary curtailment by Transco) was about 2 billion cubic feet.[7] For the three month period of November 1971 through January 1972, the net cumulative curtailments of all interstate pipelines were approximately 140 billion cubic feet.

27. These figures understate, probably by a substantial margin, the actual severity of the current gas shortage. The curtailment figures refer only to the amounts by which firm contractual demand cannot be satisfied. They do not include the amounts by which interruptible customers have been interrupted, at least interrupted more than usual, nor the amounts which would be bought at existing prices by new customers or through growth by old customers if the gas were available. It is probable

[6] Natural Gas Situation for the Winter of 1971-72. A Report to the Joint Board of Fuel Supply and Fuel Transport. Bureau of Natural Gas, Revised October 18, 1971. Table 3, p. 7.

[7] According to filings with the Commission.

that these "hidden" curtailments exceed, possibly many times over, the reported curtailments.

28. In any event, the interstate pipeline system is not currently able to satisfy the requirements of its existing customers and the future looks even more bleak. One of the more widely used, and more conservative, estimates of the nation's future requirements is the forecast by the Future Requirements Committee (FRC). According to the FRC, the demand for natural gas (1032 Btu) in the lower 48 states will increase from about 24.6 trillion cubic feet in 1971 to 29.8 trillion cubic feet in 1975.[8] Based on recent trends, the FRC estimates that the gap between this potential demand for gas and the most likely available supply will increase from .8 trillion cubic feet in 1971 to 3.8 trillion cubic feet in 1975.

29. This rather pessimistic outlook is substantiated in the recent report by the FPC staff on "National Supply and Demand 1971-1990."[9] The staff report shows the level of "unsatisfied demand" for gas increasing from 3.6 trillion cubic feet in 1975 (.2 trillion cubic feet less than the estimate by the FRC) to 9.5 trillion cubic feet in 1980, 13.7 trillion cubic feet in 1985 and 17.1 trillion cubic feet in 1990. The FPC staff estimates that between 1971 and 1990, the United States will require 186.4 trillion cubic feet more gas than will be available. These levels of "unsatisfied demand" are foreseen even after liberal allowances for pipeline imports, LNG imports, coal gas, Alaskan gas and reformed gas.

30. Recent actions by the natural gas companies would indicate that their forecasts do not differ substantially from the two forecasts discussed above. Many of these companies are moving with considerable haste to develop

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[8] Natural Gas Supply and Demand 1971-1990. Staff Report No. 2, Bureau of Natural Gas, February 1972, Table 16, p. 123.

[9] Ibid. Table 1, p. 3.

as many supplemental gas supplies as are promising and presently feasible. The natural gas industry, for example, has committed substantial resources to the development of Alaskan and Arctic gas. It has also announced intentions to invest heavily in the importation and processing of foreign LNG, the production of synthetic gas from light liquid hydrocarbons, and the gasification of coal. The FPC staff report previously cited predicts that this trend toward increased reliance on new supplemental supplies of gas will continue throughout the next two decades so that in 1990 about 40 percent of our total supply will come from these sources.

31. We neither embrace nor refute the estimates by our staff and others concerning the future balance between the supply of and demand for natural gas. But we do acknowledge that even at the present time there are many consumers who need natural gas and who are willing to pay prevailing prices but are unable to obtain it. Moreover, we are aware that there is compelling evidence which indicates that the nation will require more of this premium fuel, at least during the next few years, than it will be able to obtain from conventional domestic supplies—and possibly more than it will be able to obtain from both conventional and new supplemental supplies. Therefore, if we are to fulfill our statutory responsibilities and if the nation's environmental and economic goals are not to be unduly frustrated, it is imperative that the Commission do everything within its power which is reasonable and practicable to mitigate the seriousness of the natural gas shortage.

32. Of utmost importance is the timely development of our domestic resource base. The actions by the Commission to make domestic exploration and production more attractive are significant steps in this direction. But we also realize that we must allow and even encourage, at

least over the short term, the development of new and supplemental supplies of natural gas, including the importation of foreign LNG. We believe that our actions here provide such encouragement. We are, in effect, inviting venture capital into the development of LNG import projects and, to the extent that these projects are intrastate in nature, we are expressing our intention not to regulate them. We are firmly of the opinion that the exemption of these projects from the federal regulatory umbrella will make them more attractive to private investors and lead to more gas at a lower price to the consumer, and effect this result sooner, than if we controlled every detail and decision related thereto.

33. Moreover, our decision to leave these purely intrastate activities outside our jurisdiction allows the Commission maximum discretion in discharging, over the long term, its responsibility to assure interstate customers adequate supplies of gas at the lowest reasonable price.[10] In the current gas shortage era, imported LNG, even if substantially more expensive than domestic gas, is attractive. The alternative is to do without the gas or turn to even more expensive gas or other fossil fuel alternatives. But we do not know that this will always be true. It is estimated that the United States still has large unproven domestic reserves of natural gas, and the Commission is firmly committed to the timely development of these reserves. As previously indicated, there is also substantial interest in Alaskan and Arctic gas and in synthetic gas from either liquid hydrocarbons or coal. It could be that during the next few years there will be substantial quantities of gas from these and other sources which will become available to the interstate pipeline system and which may be more attractive from

[10] This requires that, over the long run, LNG be allowed into the interstate market only if less expensive incremental supplies are not available.

the standpoint of both price and reliability than imported LNG. If this happens, then the Commission, in order to adequately discharge its responsibility to the interstate customers, may at its discretion preclude, limit or condition the purchase of foreign LNG by interstate pipelines. As a result of our action here, we will be afforded the discretion necessary to fully protect the public interest.

34. We make these comments concerning the long-term economic viability of imported LNG projects not to discourage these projects. Indeed, we would encourage these projects so long as there is a shortage of natural gas or so long as they are competitive with other supplies of natural gas or alternative fossil fuels, and our decisions concerning jurisdiction here are intended to do that. But we want it to be clearly understood that investments in this line of economic activity—like those throughout the private sector—are made at the investor's risk. As long as imported LNG is the most attractive source of natural gas available to the interstate market for either peakshaving or baseload, we will approve its sale for resale in interstate commerce. But if at any time more attractive supply sources for the interstate market become available, the terms upon which imported LNG will be authorized for the interstate market may be adjusted accordingly. Should the latter situation develop, the viability of this and other LNG import projects may rest on the intrastate and non-utility markets which still find the imported LNG attractive.

35. In the instant case, the imported LNG is to be used largely for peak-shaving and the related prices and other conditions make this source of gas competitive—indeed very attractive—in comparison with the other alternatives.[11] In other words, the consumers in Massachusetts

[11] The Examiner found that the impetus for this project was ". . . not only that demand for pipeline gas exceeds present supplies

and elsewhere who receive this LNG should pay less for their gas than they would if this import were not allowed. In addition, the quantities being imported are not so significant as to commit irretrievably the Northeast, or any portion thereof, to a foreign supply which is considered less reliable than domestic supplies. The apparent alternative to approving this project is to either do without the subject quantities of gas or to force the customers of Distrigas to use more expensive alternative sources of peak-shaving gas. These alternatives are not in the public interest.

36. We would remind that, under Section 3 of the Natural Gas Act, after approval of an application to import natural gas, we ". . . may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate." The Commission recognizes its responsibility and authority to take such action if and when the public interest so requires.

37. By our Order of January 20, 1972, we consolidated the Distrigas applications in Docket Nos. CP72-165, CP 72-167 and CP72-168, set the matter for formal hearing and permitted the importation of one shipload of LNG to be purchased from British Methane. The hearings therein have been completed, briefs filed, and a certification submitted to us for waiver and omission of the intermediate decision procedure, which we shall herein grant. In consideration of (1) our disposition of the proposal in Docket No. CP70-196, (2) Distrigas' failure to prosecute its application in Docket No. CP72-167, and

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in some markets, but also use of LNG, is cheaper than liquefied petroleum gas (LPG) for 'peak-shaving,' only so much LPG can be mixed efficiently for distribution with natural gas, and imported LNG is as cheap or cheaper than liquefaction and storage of domestically produced gas, assuming domestically produced gas were available for liquefaction."

(3) the elimination of any requested authorization for the importation of any additional British Methane cargo in Docket No. CP72-165, we deem it appropriate to terminate the proceedings in these three consolidated dockets by treating the British Methane LNG, imported under our authorization of January 20, 1972, as the second 1971-1972 Alocean cargo.[12]

The Commission further finds:

(1) It is in the public interest that Distrigas be authorized to import LNG, subject to approval of this Commission as provided in the Natural Gas Act, and also subject to refund should the same be warranted.

(2) Distrigas is a "natural gas company" within the meaning of the Natural Gas Act, subject to the jurisdiction of this Commission only in regards to its transportation or sale for resale of gas in interstate commerce and all other activities of Distrigas are outside our jurisdiction.

The Commission orders:

(A) Authorization is issued to the Distrigas Corporation for this importation of LNG. This order is conditioned upon Distrigas Corporation filing tariffs with respect to the interstate transportation and sale for resale of the LNG with this Commission for approval as provided in the Natural Gas Act, subject to refund should refunds be warranted.

(B) The Initial Decision of Presiding Examiner Litt as modified herein and not inconsistent with this opinion is adopted as the Commission's decision.

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[12] Distrigas received authorization from this Commission on October 22, 1971, to import approximately 80% of one full Alocean cargo. Two Alocean shipments were contemplated in Docket No. CP70-196 during the 1971-1972 heating season.

(C) Exceptions not granted herein are hereby denied.

(D) The motion for waiver and omission of the intermediate decision procedure in Docket Nos. CP72-165, CP 72-167 and CP72-168 is granted and the proceedings therein terminated by reason of our disposition above.

By the Commission. Chairman Nassikas dissenting filed a separate statement appended hereto.

Commissioner Moody dissenting filed a separate statement appended hereto.

[SEAL]

Kenneth F. Plumb
Secretary

APPENDIX B

CP71-68
COLUMBIA LNG CORPORATION

CP71-153
CONSOLIDATED SYSTEM LNG COMPANY

CP71-151, CP71-264
SOUTHERN ENERGY COMPANY

CP71-276
SOUTHERN NATURAL GAS COMPANY

CP71-289
COLUMBIA LNG CORPORATION
CONSOLIDATED SYSTEM LNG COMPANY

CP71-290
CONSOLIDATED SYSTEM LNG COMPANY

BROOKE, Commissioner, concurring, but dissenting on limited issue:

As a practical matter, I concur with the decision reached by the Commission, but noting the reservation of jurisdiction with respect to future Section 7 certification of similar terminal facilities, and dissenting on a rather limited issue.

From a regulatory point of view, I would prefer to exert Commission jurisdiction when the gas commences its interstate movement at the tailgate of the gasification plant. I would not, in general, prescribe a Section 7 certificate for the LNG terminal facilities, although I would require certification of the pipeline facilities emanating from the terminal when used for interstate transmission.

However, in the posture of this case and particularly since the applicants sought certification and the issue was not litigated, I have agreed to a Section 7 certificate for the terminal facilities, specifically reserving my position in reviewing comparable facilities in future cases. In *Distrigas*, the Commission followed the tailgate concept. *Distrigas* was predicated on peakshaving intrastate markets; *Columbia LNG, et al.* is concerned with base-load interstate markets. Even in *Distrigas*, provision was made for the consideration of interstate sales as they might develop in the future.

The Commission has concluded that "El Paso Algeria is a natural gas company and that it is required to obtain a Section 7(c) certificate for the sale of LNG (natural gas) to Columbia LNG, Consolidated LNG, and Southern Energy for resale in interstate commerce."

I disagree.

Under the proposal, Sonatrach will sell and deliver the LNG to the El Paso Algeria Corporation at Arzew, Algeria. The gas then will be transported to the United States in cryogenic tankers owned and operated by the El Paso Marine Company, with title passing on the high seas from El Paso Algeria to the three American importing companies.

When the LNG enters the United States, it will be the property of Columbia LNG, Consolidated LNG and Southern Energy. Whether title passed in mid-Atlantic or at dockside, El Paso Algeria would not need a certificate because, in my opinion, the importation does not constitute transportation or sale within the accepted interpretation of the "interstate commerce" provision of the Natural Gas Act. (*Border Pipe Line Company* v. *F.P.C.*, 171 F.2d 149 (D.C. Cir. 1948)).

I do agree with the initial rate condition, but in lieu of applying it as a condition in a Section 7(c) certificate, which I believe to be inappropriate, I would make it a condition only of the Section 3 import permit.

/s/ Albert B. Brooke, Jr.
ALBERT B. BROOKE, JR.
Commissioner

APPENDIX D

The Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-717w, provides in pertinent part:

> SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. § 717(a)]
>
> (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]
>
> (c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The

matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717 (c)]

SEC. 2. When used in this act, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar

as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively. [52 Stat. 821 (1938); 15 U.S.C. § 717a]

SEC. 3. After six months from the date on which this act takes effect no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate. [52 Stat. 822 (1938); 15 U.S.C. § 717b]

* * * *

SEC. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by

the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

* * * *

SEC. 7. (e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified appli-

cant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

* * * *

SEC. 19. (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[10] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with

it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting side, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

* * * *

JUN 26 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1761

DISTRIGAS CORPORATION, DISTRIGAS OF NEW YORK CORPORATION and DISTRIGAS OF MASSACHUSETTS CORPORATION,

Petitioners,

against

FEDERAL POWER COMMISSION,

Respondent,

PACIFIC LIGHTING SERVICE COMPANY, *et al.*,

Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MEMORANDUM FOR INTERVENOR PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN SUPPORT

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MEMORANDUM FOR INTERVENOR PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN SUPPORT

1. Petitioners seek review of the Court of Appeal's Decision (Pet. App. A, pp. 1a-19a) affirming the Decisions of the Federal Power Commission issued May 25, 1973 (Pet. App. B, pp. 20a-27a) and its Order Denying Rehearing issued June 20, 1973 (Pet. App. C, pp. 28a-63a). Public Service Electric and Gas Company (here-

inafter "Public Service") supports the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

2. Public Service is a corporation organized under the laws of the State of New Jersey and has its principal office at 80 Park Place, Newark, New Jersey. It is a public utility operating company engaged among other things in the purchase, manufacture and distribution of gas. It purchases natural gas from three interstate transmission pipeline companies and serves gas to over 1,290,000 customers in an area having a population in excess of 4,900,000 persons and which extends from the Hudson River opposite New York City to the Delaware River at Trenton and thence to Camden, New Jersey.

3. On May 24, 1972, Public Service and Algonquin Gas Transmission Company entered into a contract to purchase Liquefied Natural Gas (LNG) from Societe Nationale Sonatrach (Sonatrach), an Algerian national company. The volumes to be purchased amount to 1,200 billion thermies of LNG over a period of approximately 22 years. Depending upon the BTU content, this amounts to approximately 4,760,000,000 Mcf.

Public Service plans to use the terminal facilities of Distrigas in order to receive its share of Algerian LNG. In addition, Public Service has arranged for the purchase of 5,000,000,000 cubic feet a year of LNG from Distrigas for a period of 20 years commencing in the winter of 1975-1976.

4. As part of the agreement with Distrigas, Public Service has agreed to make a first mortgage loan to Distrigas amounting to $60,000,000 to be used for the construction of the Staten Island facilities. From the period of January 29, 1973, to date, Public Service has loaned

$56,100,000 to Distrigas. In making this large investment Public Service *relied* on the Federal Power Commission's Orders and Opinions Nos. 613 and 613-A, dated March 9, 1972, and June 7, 1972, in Docket Nos. CP70-196, et al. These Orders were *final* and *non-appealable* at the time Public Service commenced making the mortgage loan, and Public Service *relied* on the fact that these Orders were final and that authorization for the construction of the facilities had been granted by the Federal Power Commission. In fact, all the necessary permits and authorizations had been granted to Distrigas. This was one of the compelling factors which induced Public Service to decide on using the Distrigas facilities rather than constructing its own facilities in New Jersey for the importation of LNG.

5. The Writ should be granted because the question of whether the conditioning authority of Section 3 of the Natural Gas Act (15 U.S.C. 717) can be used to impose Section 7 certificate jurisdiction over intrastate sales and operations over which the Federal Power Commission has been expressly denied jurisdiction by Section 1(b) of the Act is presented for the first time. Collateral to that issue is the question of whether the authority so imposed may be applied retroactively upon operations which have already commenced upon the understanding that they were not subject to Commission jurisdiction. Instead of overruling *Border Pipe Line Company* v. *F.P.C.*, 84 U. S. App. D. C. 142, 171 F. 2d 149 (1948), or following the reasoning the Commission used to support its Orders of May 25, 1973, and June 20, 1973, which distinguished the *Border* decision on the basis that it involved the exporting of gas, the Court below held that the Commission could condition import authorization under Section 3 so as to supplant state regulatory authority over intrastate facilities and intrastate sales of LNG, if the Commission

found that comprehensive federal regulation was necessary and appropriate to the public interests. In so doing, the Court was apparently oblivious to Section 1(b).

The Court below also rejected Petitioners' argument that *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424 (1947) sets a precedent as to the finality of agency orders which should be followed in this case. Section 3 does not specifically permit the revocation of an authorization retroactively, nor can such a power be inferred. A departure from *Seatrain* in this case constitutes a deprivation of property, without due process of law in contravention of the Fifth Amendment.

The Court below at oral argument mentioned as a possible solution a "grandfather-like" clause for the facilities in view of the affirmative action of the parties in reliance upon the decision by the Commission. This possible solution, which was acceptable to Petitioners and to Public Service, was not considered in the opinion of the Court of Appeals. This possible solution merits consideration from an equitable standpoint in view of the positive and irrevocable actions which Public Service has taken and may result in irreparable harm in the event on remand the Commission should deny certification.

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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Dated: June 24, 1974

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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No. 73–1761

DISTRIGAS CORPORATION,
DISTRIGAS OF NEW YORK CORPORATION and
DISTRIGAS OF MASSACHUSETTS CORPORATION,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

PACIFIC LIGHTING SERVICE COMPANY, *et al.*,
Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR INTERVENOR CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. IN SUPPORT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73–1761

DISTRIGAS CORPORATION,
DISTRIGAS OF NEW YORK CORPORATION and
DISTRIGAS OF MASSACHUSETTS CORPORATION,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

PACIFIC LIGHTING SERVICE COMPANY, *et al.*,
Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM FOR INTERVENOR CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. IN SUPPORT

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1. Petitioners seek review of the judgment of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A, pp. 1a-19a) affirming the orders of the Federal Power Commission issued May 25, 1973 (Pet. App. B, pp. 20a-27a) and June 20, 1973 (Pet. App. C, pp. 28a-36a). Consolidated Edison Company of New York, Inc. (Con Edison) supports the Petition for Writ of Certiorari to review the judgment of the Court below.

2. Con Edison is a New York corporation and is a public utility subject to the jurisdiction of the Public Service Commission of the State of New York. Con Edison's service area for the distribution of natural gas is in New York City and Westchester County, New York. It serves natural gas to more than 1,170,000 residential, commercial, and industrial customers in the described area.

3. Con Edison receives its supplies of natural gas from four interstate natural gas pipeline companies, three of which are curtailing services to Con Edison because of supply deficiencies. One of the Petitioners, Distrigas of New York Corporation, is constructing liquified natural gas (LNG) facilities on Staten Island, New York, by means of which it proposes to render service to markets in New York, New Jersey, Maryland, and other places. Petitioners proceeded with construction of the LNG facilities in reliance on the Federal Power Commission's Opinion and Order Nos. 613 and 613–A, dated March 9, 1972, and June 7, 1972, 47 FPC 752 and 1465, respectively. The Order and Opinion were final and non-appealable at the time the Commission suddenly reversed its jurisdictional determination in its May 25, 1973, Order, on which rehearing was denied June 20, 1973. The entire project is thus placed in jeopardy. Con Edison had expected that it would receive service from said Distrigas facilities in the future and the loss of supplies from this potential source could affect Con Edison's ability to serve its markets.

4. A Writ of Certiorari should be granted because the Court below has determined that the requirements under Section 7 of the Natural Gas Act (15 U.S.C. 717) can be imposed on an applicant seeking authority under Section 3 of the Natural Gas Act to import or export natural gas, notwithstanding the applicability of Section 1(b) of the Act. Under this interpretation a company like Con Edison, fully regulated as to rates and services by the New York Public Service Commission, could be subjected to regulation as a natural gas company under FPC jurisdiction. While not specifically over-

ruling ***Border Pipeline Company*** v. ***FPC***, 84 U.S. App. D.C. 142, 171 F.2d 149 (1948), the Court below effectively held that the FPC could, under the aegis of Section 3 of the Act, concurrently exercise regulatory authority with state bodies over intrastate facilities and sales of LNG, if the FPC found that the public interest requires comprehensive federal regulation.

Furthermore, the reliance by the Court below on the "terms and conditions" language of Seciton 3 and the authority there vested does not adequately account for refusal to give weight to the reliance that Distrigas placed in the previously submitted Section 3 import permit. It is by no means certain that the Commission can change the law or should be allowed to change policy in the same case after an applicant has relied, to its detriment, on an earlier order. In the transition between the first set of orders and the second, the Commission reversed a determination on an issue of law and not of fact in what is essentially the same case. The Court below incorrectly infers that Section 3 allows the revocation of an import permit retroactively when it did not overturn the FPC's action. The retroactive application of a principle of law in a case of second impression creates an inequitable impact on the applicant which is not proper.[1] Due process of law and a fair sense of justice require otherwise.

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[1] See ***N.L.R.B.*** v. ***Majestic Weaving Co.***, 355 F.2d 854, 860 (2d Cir. 1966). See also Davis, "Administrative Law Treatise", Section 17.09, p. 607.

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 5, 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1761

DISTRIGAS CORPORATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–19a) is reported at 495 F.2d 1057. The principal order of the Federal Power Commission (*id.* at 20a–27a) and its order denying rehearing (*id.* at 28a–41a) are reported at 49 FPC 1145 and 1400, respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1974. The petition for a writ of certiorari was filed on May 24, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may properly condition import authorizations granted under Section 3 of the Natural Gas Act to provide for comprehensive regulation of the transportation and the sale for resale of imported natural gas in this country, and facilities related to those activities, where it reasonably determines that such regulation is required in order to ensure that the public interest is adequately protected.

2. Whether the Federal Power Commission, having once declined to exercise its authority to impose conditions upon an import authorization, may properly enter a supplemental order imposing such conditions, after opportunity for hearing and on the basis of appropriate findings of public need.

STATUTES INVOLVED

Sections 1, 2, 3, 7(c), 7(e), and 19(b) of the Natural Gas Act, as amended, 15 U.S.C. 717, 717a, 717b, 717f (c), 717f(e), and 717r(b), are set forth at Pet. App. 64a–69a.

STATEMENT

1. In an application filed on February 17, 1970, as amended on September 29, 1970, Distrigas Corporation (Distrigas) sought authorization from the Federal Power Commission under Section 3 of the Natural Gas Act, 15 U.S.C. 717b, to import up to 14 shiploads of liquefied natural gas (LNG) per year for 20 years into this country from Algeria.[1] The LNG was to be delivered to Distrigas at Everett,

[1] Each shipload of LNG is the liquid equivalent of approximately 1.1 billion cubic feet of gaseous natural gas.

Massachusetts, and Staten Island, New York, where terminal, storage, regasification, and related facilities were to be constructed by the company. Distrigas proposed to sell the LNG to distribution companies both within and without the states of importation. Distrigas requested in its application that the Commission issue a "disclaimer of jurisdiction" over those aspects of its project not subject to Commission jurisdiction under the Act.

Formal public hearings were held on the Distrigas proposal and, on June 14, 1971, the presiding examiner issued his initial decision in the case recommending that the requested import authorization be granted subject to certain conditions. He also concluded that, under *Border Pipe Line Company* v. *Federal Power Commission*, 171 F. 2d 149 (C.A. D.C.), the importation of natural gas is not "interstate commerce" as defined in Section 2(7) of the Act, 15 U.S.C. 717a(7).[2] Accordingly, he determined that, as to its sales and transportation of LNG within the states of importation, and as to its import facilities, Distrigas is not a "natural gas company" as defined in Section 2(6) of the Act, 15 U.S.C. 717a(6), and that these aspects of the Distrigas project are not subject to regulation by the Commission.

Exceptions to the initial decision were filed by several parties and, on March 9, 1972, the Commission issued its Opinion No. 613 (Pet. App. 42a–60a) granting authorization of the import proposal. The Commission held that transportation and sales for resale of the imported LNG to customers *outside* the states

[2] In *Border*, the court of appeals held that the exportation of natural gas is not "interstate commerce" under the Act.

of importation were subject to comprehensive regulation under the Act (*id.* at 49a–50a). But it agreed with the examiner's determination that the importation of LNG does not constitute "interstate commerce" as defined in the Act (*id.* at 49a) and that the Distrigas import facilities, as well as the company's sales and transportation of LNG *within* the states of importation, "are therefore outside of our jurisdiction" (*id.* at 52a).[3]

Chairman Nassikas and Commissioner Moody filed separate dissents to the majority opinion, stating that, as a matter of law and policy, the Commission should assert jurisdiction over the entire Distrigas project.[4]

2. In late 1972 and early 1973, Distrigas and one of its affiliates filed several applications with the Commission proposing a substantial expansion of the import project. Distrigas sought authorization under Section 3 of the Act to import considerable additional quantities of LNG, and both companies requested certificate authorization under Section 7, as amended, 15 U.S.C. 717f, for the transportation and sale for resale of LNG to customers in states other than the states of importation. In addition, another affiliate

[3] The majority noted that it had ample authority under Section 3 of the Act to assert jurisdiction over all aspects of the Distrigas project as a condition to its import authorization (Pet. App. 52a). It declined to so condition the authorization, however, finding that, on balance, such an assertion of jurisdiction would not serve the public interest (*id.* at 52a–58a). The Commission cautioned, however, that it was empowered under Section 3 to modify import authorizations from time to time as required by the public interest (*id.* at 58a).

[4] Rehearing was thereafter denied (47 FPC 1465). A petition for review was filed but later dismissed on motion of the petitioner (Pet. App. 8a).

applied for authorization under Section 7 to construct a pipeline between Staten Island, New York, and Woodbridge, New Jersey, for use in the delivery of regasified LNG to New Jersey customers.

In light of these filings, the Commission, on May 25, 1973, issued the first of the orders at issue in the present case (Pet. App. 20a–27a). It stated that the new applications showed clearly that the complexion of the Distrigas project had changed considerably since the issuance of Opinion No. 613 (*id.* at 22a). The project had become primarily interstate rather than intrastate in nature, and it had become clear that the import facilities in Massachusetts and New York would be used in the interstate transportation and sale for resale of natural gas (*ibid.*). The Commission held that, in these circumstances, it was required under the Act to exercise jurisdiction over the construction and operation of these facilities; it accordingly ordered Distrigas and its affiliates to submit the necessary applications pursuant to Section 7 (*id.* at 22a–23a).[5]

In its subsequent order denying rehearing (*id.* at 28a–41a), the Commission stressed that Opinion No. 613 had involved the first large-scale, long-term LNG import project and that the majority in that case had cautioned that its decision represented only the first step in the development of a comprehensive Commission policy on LNG imports (*id.* at 29a–30a). It also emphasized that the jurisdictional policy expressed in

[5] Commissioner Brooke dissented (Pet. App. 24a–27a) on the ground, *inter alia*, that the Commission was bound by its earlier disclaimer of jurisdiction over the Distrigas facilities in Opinion No. 613.

Opinion No. 613 had already been abandoned in other cases (*id.* at 31a).[6]

The Commission rejected the claim that LNG import facilities were not, in any event, properly within its jurisdiction under the Act. It reasoned as follows. Section 1(a) of the Act, 15 U.S.C. 717(a), expresses a clear congressional policy that federal regulation of the sale and transportation of natural gas in both interstate and foreign commerce is necessary in the public interest (*id.* at 31a–32a). In light of this policy, the definition of the term "interstate commerce" in Section 2(7) of the Act must be read to encompass the importation of LNG (*id.* at 32a).[7] LNG import facilities are therefore used in the transportation of natural gas in "interstate commerce" and are subject to comprehensive regulation by the Commission under the Act (*id.* at 32a–33a). Sales of imported LNG for resale, both within and without the states of importation, also occur in "interstate commerce" and are thus within the Commission's jurisdiction (*ibid.*). "To the

[6] See Opinion No. 622, 47 FPC 1624, where the Commission asserted jurisdiction, pursuant to Section 7 of the Act, over the construction and operation of the import facilities involved in another LNG project.

[7] Section 2(7) defines "interstate commerce" as "commerce between any point in a State and any point outside thereof * * *, but only insofar as such commerce takes place within the United States." The Commission reasoned that, when LNG is imported, commerce occurs between a "point in a state" (the American port where the LNG is delivered) and a "point outside thereof" (the foreign country where the shipment originates) (see Pet. App. 32a).

extent the *Border* decision could compel a contrary result, that holding is in error" (*id.* at 32a).[8]

3. On review, the court of appeals rejected the Commission's finding that the importation of natural gas is "interstate commerce" under the Act, holding that such an interpretation of the statute is contrary to the decision in *Border, supra* (*id.* at 13a–14a). The court agreed with the Commission that "neither the language nor the legislative history of the Act's interstate commerce definition unambiguously establishes the correctness of the *Border* construction" (*id.* at 13a), but it declined to overrule that decision because it was not "convinced that *Border's* construction would inevitably place imports of natural gas into * * * [a] regulatory gap" (*id.* at 14a).

The court reasoned that the Commission has authority under Section 3 of the Act to assert jurisdiction over import facilities, and over all sales of imported LNG, as a condition to its grant of import authorization, if it finds that such a condition is required by the public interest (*id.* at 14a–15a). Accordingly, no "attractive regulatory gap need result if *Border* is allowed to stand" (*id.* at 14a).

The court rejected the contention that the Commission was barred by its disclaimer in Opinion No. 613 from exercising jurisdiction over the facilities and sales of Distrigas. It emphasized that Section 3 specifically authorizes the Commission to modify pre-

[8] The Commission found that its assertion of jurisdiction over the Distrigas facilities could also be based on a theory of "commingling," since the facilities would be used in connection with concededly jurisdictional sales to customers located in states other than the states of importation (Pet. App. 32a–33a).

viously granted import authorizations, and that Opinion No. 613 itself had "frankly warned Distrigas that its jurisdictional decision was tentative" (*id.* at 16a).

Since the Commission had not based its assertion of jurisdiction on Section 3 of the Act, it had not held a hearing or made the findings required by that section prior to the modification of the import authorization. The court of appeals therefore set the orders aside and "remand[ed] the record for supplementation, with directions that the Commission conduct the hearing required by Section 3 and that it supply findings and reasons to support its jurisdictional determination under Section 3's public interest standard" (*id.* at 19a).[9]

ARGUMENT

1. Petitioners contend (Pet. 11–13) that the Commission has no authority under Section 3 of the Act to attach to an LNG import authorization conditions reasonably designed to ensure that the importation will not unduly injure domestic commerce and will not harm the legitimate interests of the consuming public. With respect to the importer's facilities and sales within the state of importation, petitioners say that the Commission has no regulatory jurisdiction save the power to allow or disallow the importation itself.

[9] The court made clear, however, that the Commission will not be limited on remand to making a Section 3 determination. "[N]othing in this opinion precludes the Commission, on remand, from reverting to the commingling theory [see note 8, *supra*], rather than turning to Section 3, if it does so in a manner that allows responsible judicial review" (Pet. App. 19a).

There is, however, no basis in the Act for so narrow a reading of the conditioning authority conferred on the Commission by Section 3. In disposing of an application for import authorization, the Commission is empowered to "grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate * * *." That authority, as the court of appeals correctly stated, "is at once plenary and elastic" (Pet. App. 14a); it "supplies the Commission not only with the power necessary to prevent gaps in regulation, but also with flexibility in exercising that power" (*id.* at 15a). "So long as its conclusion is reasonable and reasonably supported by substantial record evidence" (*id.* at 14a), the Commission may properly determine that the public interest requires a condition subjecting the importer's facilities and sales to close Commission regulation.

In any event, the issue need not be reached in the present posture of the case. The Commission has taken no final action under Section 3 to impose the sort of condition discussed by the court of appeals. If it determines not to do so, there would be no need to resolve in this case the abstract issue of whether it *could* attach such a condition. If it does impose a condition, petitioners will be able to litigate the Section 3 issue on review of that action and in the light of the precise language and justification of a concrete condition.

2. Petitioners also contend (Pet. 13–15) that any imposition of Section 3 conditions by the Commission would amount to an improper "retroactive revoca-

tion" (Pet. 14) of the prior import authorization. Section 3 specifically provides, however, that the Commission "may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate." In its initial authorization, the Commission quoted that portion of Section 3 and cautioned that it "recognizes its responsibility and authority to take such action if and when the public interest so requires" (Pet. App. 58a).

In any event, this claim is hypothetical in the present circumstances. The Commission has not exercised its authority under Section 3 to enter a "supplemental order." The propriety of such an order may be litigated if and when it is issued.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

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SEPTEMBER 1974.

[10] Similarly, there is no need to determine at this stage of the proceeding whether the Commission's initial refusal to assert jurisdiction would foreclose an assertion of jurisdiction on remand based either on the commingling theory (see notes 8 and 9, *supra*) or on some other ground.

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